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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1615

KING RADIO CORPORATION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

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KING RADIO CORPORATION, INC.,
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

Petitioner, King Radio Corporation, Inc., petitions for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Tenth Circuit entered in this case on February 24, 1975, enforcing an order of the National Labor Relations Board; petition for rehearing denied on March 24, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals 74-1421, was issued February 12, 1975, 510 F.2d 1154, 88 LRRM[1] 2819. The Court of Appeals enforced the decision of the National Labor Relations Board reported at 202 NLRB No. 82. Both the opinions of the National Labor Relations Board and the Court of Appeals are printed herewith at Appendix A and C (pp. A1-A6, A9-A33).

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1. LRRM refers to Labor Relations Reference Manual, Bureau of National Affairs.

JURISDICTION

Jurisdiction to review by Writ of Certiorari the judgment and decision of the United States Court of Appeals for the Tenth Circuit, entered March 5, 1975 (App. pp. A1-A8), petition for rehearing denied March 24, 1975, is involved under the provisions of 28 U.S.C. Section 1254(1) and Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.).

QUESTION PRESENTED

The question presented is whether an employer violated the good faith bargaining provisions of Section 8(a)(5), (1) and (d) of the National Labor Relations Act by withdrawal of recognition of a union certified as a collective bargaining representative more than six years previously in reliance upon considerable turnover and a substantial increase in the number of bargaining unit personnel.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.) which are involved in this case are set forth in Appendix pages A69-A72. For the convenience of the Court, however, the pertinent provisions of Section 8(d) of the National Labor Relations Act are set forth immediately below:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in

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good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

STATEMENT OF THE CASE

The judgment and decision, of which review by this Court is now sought, enforced the order of the National Labor Relations Board requiring the petitioner to cease and desist from:

(a) Failing and refusing to bargain collectively concerning rates of pay, wages, hours of employment, or other terms and conditions of employment with Communication Workers of America, AFL-CIO, as the exclusive representative of its employees. . .

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act;

Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above named labor organization as the exclusive representative of the employees in the above described appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a written, signed agreement.

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King Radio Corporation, Inc. (hereinafter referred to as the "Company" or "Petitioner") contends that evidence presented establishing turnover of employees and expansion of the bargaining unit was sufficient to cast doubt on the Communication Workers' (hereinafter referred to as the "Union") continued majority status and since the General Counsel failed to come forward with evidence to prove majority status on the critical date, the Company did not violate Section 8(a)(5) of the Act when it withdrew recognition and declined to continue to negotiate with the Union. Furthermore, that the Board and the Court of Appeals, Tenth Circuit (hereinafter referred to as the "Court of Appeals") have ordered the Company to bargain with the Union without finding that the Company engaged in "outrageous" and "pervasive" unfair labor practices; or less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes (*Automated Business Systems* v. *NLRB*, 497 F.2d 262 (6th Cir. 1974) and *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed. 2d 547 (1969)).

This case initially arose from negotiations between the Company and the Union for a collective bargaining agreement after twenty or more negotiation periods during the years 1968, 1969, 1970, 1971 and 1972 (LJD, App. A63-A64).[2]

At the time of the election, resulting in the Board's certification, there were 343 eligible voters in the unit; 182 votes were cast for the Union and 114 against it with three void ballots and 26 challenged ballots (LJD, App. A58). Between the period of 1967 and August 9, 1972, the date recognition was withdrawn by the Company, 4,214 employees were employed and 3,423 employees were terminated. There were 876 hourly employees employed within

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2. References to LJD refer to the Administrative Law Judges' Decision, printed in the Appendix hereto at pages A33-A68.

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the bargaining unit on the date recognition was withdrawn. Twenty-four of the 876 hourly employees employed at that time were employed by the Company during the June, 1966 election (LJD, App. A58-A59). The last bargaining session between the parties was held on February 18, 1972. Wages, holidays and dues collections were still in disagreement at the conclusion of this meeting (LJD, App. A59-A60). Thereafter Paul Scales, a new staff representative for the Union, was designated in March of 1972, as the Union's negotiator with the Company (LJD, App. A49). After attempting to reach the Company's attorney on several different occasions, the Union representative finally spoke with the Company's attorney on May 22, 1972 (LJD, App. A49). The Union representative confirmed the conversation by letter which concluded, "I will keep my calendar as open as possible on the assumption we will resume talks soon after June 20, 1972." (LJD, App. A49-A50). The Union representative wrote a letter dated July 17, 1972 informing the Company that he would be available on July 25, 27, 28, August 1 and 3, 1972, to resume negotiations. After not receiving a response to this letter, the Union representative wrote the Company's attorney again on July 27, 1972.

On August 3, 1972, the Union filed an unfair labor practice charge against the Company claiming a violation of Section 8(a)(1) and (5) of the Labor Management Relations Act.

On August 11, 1972, the Company's attorney wrote the Union representative a letter in which he informed him that he had been away from his office for the past two weeks; that the Union and the Company had been engaged in negotiations for over five years, which included a series of meetings; the last meeting held had resulted in a number of agreements on various subjects, but that disagree-

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ments still remained; that the Company had not changed its position on the subjects in disagreement and had not been informed that the Union had changed its position on them; that in the interim the Company had experienced an almost one hundred percent turnover in bargaining unit employees; that less than twenty percent of the employees employed with the Company that were employed in June, 1966, when the NLRB election was conducted remained employed and that inasmuch as the number of employees in the bargaining unit had more than doubled, the Company believed that the Union's majority status had been affected (LJD, App. A50-A52).

On August 29, 1972, the Union representative responded to the Company's attorney's letter taking issue only with the Company's refusal to return to the bargaining table but without indicating a change of position on the subjects still in disagreement during the last negotiation session in February of 1972 and without asserting a continuing majority status (LJD, App. A52-A53).

During this same period of time, the Regional Office of the National Labor Relations Board was in the process of computing back pay resulting from a previous decision of the Board enforced by the Court of Appeals that the Company had violated Section 8(a)(1) and (5) of the Act in cases 166 NLRB 180 and 166 NLRB 649. These Board decisions were enforced by the United States Court of Appeals, Tenth Circuit, on July 22, 1968 (398 F.2d 14). Thereafter, the Board issued its decision in 172 NLRB 1051 on July 9, 1968, finding that Respondent had violated Section 8(a)(5) of the Act. This decision was enforced in part by the Tenth Circuit Court of Appeals on September 17, 1969 (416 F.2d 596), and certiorari was denied by the United States Supreme Court on April 27, 1970 (397 U.S. 1007).

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The Law Judge herein concluded that the Company "had sufficient objective grounds for believing that a majority of the employees no longer desired Union representation and that since the General Counsel failed to come forward with the evidence that the Union in fact did represent a majority of the employees in the unit the Company was not barred from questioning the Union's majority status because of unremedied unfair labor practices as it was undisputed that the Company similarly posted the notice required by the Board's 1968 order and thereafter met with the Union for the purpose of negotiating a collective bargaining agreement on some twenty or more occasions during 1968, 1969, 1970, 1971 and 1972." The Law Judge further held, "The only subject remaining unresolved in the Board's third unfair labor practice order is computation of back pay and, in view of the joint motion of the parties for clarification of the Board's order and the Board's order of clarification which issued on October 7, 1971, I do not regard the alleged back pay obligation as unremedied unfair labor practices sufficient to bar the employer from asserting a good faith doubt of the Union's continued majority status. Some five years have elapsed since Respondent committed unfair labor practices; Respondent has posted the required notices and complied in other respects; many months of bargaining have since taken place; no independent violations have been alleged and proven." (LJD, App. A63-A64).

In reaching the conclusion that the Company presented sufficient evidence to cast doubt on the Union's continued majority status, the Law Judge stated:

> "In sum, the evidence of record establishes that from the date of the election to August 1972, when recognition was withdrawn, the size of the unit increased from 343 to 876; there was a turnover of some 4,000 em-

ployees; and only 22 of the employees who were employed on the date of the election remained employed during August 1972. And, these facts must be considered in the context of an Employer who, as found herein, has engaged in no subsequent unfair practices and has been engaged in good faith bargaining with the Union for some five years to negotiate a contract." (LJD, App. A65).

The Law Judge reached this conclusion in reliance upon the Board's decision in *Stoner Rubber Company*, 123 NLRB 1440 (1959) and *Taft Broadcasting, WDAF-TV, AM-FM*, 201 NLRB No. 113 (1973).

Thereafter, the Board reversed the Administrative Law Judge stating, "Because the Union maintained the majority status at the time of the certification, it must be presumed that it still maintains its majority status absent other strong evidence which may form a reasonable basis for believing that the Union has lost its majority status. In this case, we do not find the required other strong evidence which may form a reasonable basis for believing that the Union lost its majority status." (See page A24 of Board decision). In doing so the Board applied the "good faith doubt test" and distinguished Board cases relied upon by the Company by emphasizing that in those cases employers were not engaged in any unfair labor practices while in the instant case the Company had not fully complied with the Board's previous orders, enforced by the Court of Appeals. In reaching the conclusion that prior unremedied unfair labor practices preclude an employer from questioning the majority status of the Union, the Board relied on *C&C Plywood Corporation and Veneers, Inc.*, 163 NLRB 1022 (1967); *Miami Coca-Cola Bottling Co. d/b/a Key West Coca-Cola Bottling Co.*, 150 NLRB 892 (1965). In conclusion the Board stated at pages A27-A28 of its decision:

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"Based on the above, it is clear that the Respondent has not established the existence of objective facts establishing a reasonable basis for a good faith doubt of the Union's majority status as of August 1972, when it withdrew recognition from the Charging Party. It is obvious that the claim of such doubt of the Union's majority status was an afterthought in response to the charge filed by the Union on August 3, 1972, and merely constituted another effort by the Respondent to avoid the possibility of entering into an agreement with the Charging Party. This is clear from the fact that during the critical negotiating sessions involved herein and following them up until August 11, 1972, the Respondent had never made a claim to the Union that it doubted its majority status, even though the factors upon which it relied to establish the alleged doubt in this case were well known to the Respondent during all critical times herein.

. . .

"Taking into account all the objective considerations on which the Respondent relies, we find that they are insufficient to demonstrate that the Respondent had reasonable grounds for believing that the Union no longer commanded majority employee support at the time of its refusal to bargain. This, coupled with the fact that the Respondent made clear when it refused to bargain that it did not want to deal further with the Union, i.e., it is not obligated to continue a 'fruitless marathon of bargaining', leads us to the conclusion that the Respondent's asserted doubt of majority lacks sufficient basis to justify its refusal to bargain. We conclude from Respondent's conduct in delaying further negotiations by its delay in answering the communications of Scales to resume bargaining, its admitted statement that an agreement was close at hand, and its unsup-

portable position that an impasse was reached, that the Respondent was not bargaining in good faith."

On August 23, 1974, the Board filed with the United States Court of Appeals for the Tenth Circuit (hereinafter referred to as the "Court of Appeals") a petition seeking enforcement of the Board's original decision and order. The matter was argued on January 24, 1975, and on February 24, 1975, the Court of Appeals enforced the Board's original order (510 F.2d 1154).

The Court of Appeals agreed with the Board's application of the "good faith doubt test" applying the rationale of *National Labor Relations Board* v. *Rish Equipment Co.*, 407 F.2d 1098, 1101 (4th Cir. 1969) and *National Labor Relations Board* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (8th Cir. 1969). It further interpreted *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104, 75 S.Ct. 176, 99 L.Ed. 125 (1954) as standing for the proposition that the question concerning an employer's refusal to bargain when he doubts a Union's continued majority is a matter appropriately determined by the Board's administrative authority. At the same time the Court rejected the Board's argument that the Company could not question the majority status of the Union because it had not paid the back pay award inasmuch as three years had gone by since the Board clarified that award and the employer offered to pay the amount which the Board attorney estimated to be due prior to withdrawing recognition from the Union. In conclusion the Court of Appeals stated:

"The record shows no indication of employee opposition to Union. Employer's reliance on increase in unit size and personnel turnover does not impress us. The claim of loss of majority status was not made until after Union filed an unfair practice charge based on failure to negotiate. The Board was justified in finding that Employer was not bargaining in good faith."

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REASONS FOR GRANTING THE WRIT

This Writ presents issues involving withdrawal of recognition of a collective bargaining representative which form the basis for considerable disagreement and conflict among the Courts of Appeals as well as the Board members. The issues are of paramount importance in the administration of labor relations statutes and enforcement of the refusal to bargain provisions of the Labor Management Relations Act throughout the nation.

I. Appropriate Test to Be Applied at Time Recognition Is Withdrawn.

In the instant case, the Board and the Court of Appeals have found the Company violated Section 8(a)(5) and 8(d) of the Labor Management Relations Act since it withdrew recognition and declined to bargain with the Union relying primarily upon considerable turnover of employees and a substantial increase in unit size as a sufficient basis to cast doubt on the Union's continued majority status. This test has been viewed as "substantially an objective test" and was adopted by the National Labor Relations Board in *Stoner Rubber Company, supra.* The doctrine requires that once sufficient evidence has been presented to cast a doubt on the continuing majority status, the burden shifts to the general counsel to prove on the critical date the Union in fact represented a majority of the employees. The following courts have applied the "Stoner" test in these cases: *Automated Business Systems* v. *National Labor Relations Board,* 497 F.2d 262, 269-272 (6th Cir. 1974); *NLRB* v. *Dayton Motels,* 474 F.2d 328 (6th Cir. 1973); *Lodges 1746 and 743, International Association of Machinists and Aerospace Workers, AFL-CIO,* 416 F.2d 809, 811-813 (D.C. Cir. 1969), *cert.*

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denied 396 U.S. 1058, 90 S.Ct. 751, 24 L.Ed. 2d 752 (1970); *Allied Industrial Workers Local 289* v. *NLRB*, 476 F.2d 868 (D.C. Cir. 1973); and *NLRB* v. *Frick Co.*, 423 F.2d 1327 (3d Cir. 1970).

In this case, the Board and the Court of Appeals, contrary to the Administrative Law Judge, have applied the reasonable "good faith doubt" rule enunciated earlier by the Board in *Celanese Corporation of America*, 95 NLRB 664 (1951) which places the emphasis on an "employer's subjective intent" at the time of the withdrawal of recognition to conclude that the Company has violated Sections 8(a)(5) and 8(d) of the Act. Other Courts of Appeals have also concluded that the "good faith doubt" subjective test is the appropriate test to be applied when an employer withdraws recognition after the end of the certification year. *Terrell Machine Company* v. *NLRB*, 427 F.2d 1088, 1090 (4th Cir. 1970), *cert. denied* 398 U.S. 929 (1970); *NLRB* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (8th Cir. 1969); *Bally Case and Cooler* v. *NLRB*, 416 F.2d 902, 905, 906 (6th Cir. 1969), *cert. denied* 399 U.S. 910, 90 S.Ct. 2201 (1970); *NLRB* v. *Gulfmont*, 362 F.2d 588, 589 (5th Cir. 1966); *NLRB* v. *Tesoro Petroleum Corp.*, 431 F.2d 95, 97 (9th Cir. 1970); *Laystrom Mfg. Co.*, 151 NLRB 144, *enf. denied* 359 F.2d 799 (7th Cir. 1966); and *NLRB* v. *Leatherwood Drilling Co.*, Nos. 74-2415 and 74-2421 (5th Cir. May 27, 1975), 89 LRRM 2460.

The two views have been recognized by the Court of Appeals, Sixth Circuit, in *Automated Business Systems* v. *NLRB, supra*, at footnote seven:

> "The board has characterized the *Stoner* holding as a minority rationale since only two members concurred in the quoted language. Taft Broadcasting, WDAF-TV AM-FM, 201 NLRB No. 113, was decided on the

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Stoner theory. The Board characterizes the Taft Broadcasting reliance on *Stoner* as dictum. The Board ruled that the correct rule was still that adopted in Celanese Corporation of America, 95 NLRB 664 (1951). In *Celanese*, the Board applied a good faith doubt test in determining whether an employer was justified in refusing to bargain with the union. The Board held that a good faith doubt of the union's majority was a complete defense to § 8(a)(5) unfair labor practice charges, regardless of the actual majority status of the union. While the Board indicated that some basis in fact must exist to support the employer's doubt, the test was largely subjective. In *Stoner*, emphasis was placed on the production of evidence to cast a serious doubt on the Union's majority status. This test is substantially an objective test. Since the test is objective and governed by the evidence produced by the employer rather than the employer's intent, there appears to be no reason for adopting a different test for rebutting the presumption of majority status than for withdrawing recognition. . . . We find the *Stoner* rationale to be persuasive and to be the better rule and the one adopted by the courts. Allied Industrial Workers, Local 289 v. NLRB, 155 U.S.App.D.C. 112, 476 F.2d 868 (1973); NLRB v. Frick Co., 423 F.2d 1327 (3d Cir. 1970). The General Counsel is in a much better position to prove the majority status of the union than is the employer." 497 F.2d at 271 n. 7.

Moreover, the Court of Appeals (7th Circuit) also has recognized the two lines of cases. In *Orion Corporation* v. *NLRB*, No. 74-1432 (7th Cir. April 28, 1975), 89 LRRM 2135 at page 2137 wherein it stated:

"The principal difficulty in resolving the central legal issue in this case is reconciling divergent treatments

accorded the allocation and measure of the burden of proof in several of the leading refusal to bargain cases. . . .

"At issue here are the weight and effect of that rebuttable presumption of continued majority status.

"There are two lines of cases, one emphasized in the Board's order relying on Terrell and the other in the Company's brief relying on Stoner. The Terrell approach holds that the presumption of continued majority is 'sufficient to establish prima facie a continuing obligation to bargain' (427 F.2d at 1090), or in the words of this Court, following Terrell

> 'The effect of the presumption is merely to require the employer to bargain with a previously recognized representative unless it can show (1) that the union in fact has lost its majority, or (2) at the least, that reasonable grounds exist for good faith doubt as to continuing majority support for the representative. Celanese Corp., 95 NLRB 664, (1951); Terrell Machine Co. v. NLRB, supra.' Zim's Foodliner, Inc. v. NLRB, supra, 495 F.2d at 1139.

"The Stoner approach varies this formulation slightly:

> '. . . to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with *evidence* that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit.'" 123 NLRB at 1445.

Board member Kennedy also emphasized the conflicting views in the Board's decision in *Orion Corp.*, 210 NLRB 371, 86 LRRM 1193, 1197 (1974):

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"My colleagues ignore the fundamental principle that an employer may not deal with a minority union. The Employer's mistaken good-faith belief that a union represents a majority is no defense. International Ladies' Garment Workers' Union, AFL-CIO, v. NLRB, 366 U.S. 731, 48 LRRM 2251 (1961). We have said that an employer may not continue to deal with an incumbent union if he has reasonable cause to believe that the union does not command majority support. In Anderson Pharmacy, 187 NLRB 301, 76 LRRM 1163, the Board found that the employers violated Section 8(a)(1) and (2) by executing a new contract with an incumbent union when there was ample evidence that the employers were aware that the status of the Guild as the bargaining agent of the employees was open to serious question. The same reasoning must apply in the instant case.

. . .

"I reject the suggestion in the majority opinion that my 'rationale would permit an employer at its whim to withdraw recognition.' It is totally inaccurate to suggest or imply that Respondent's withdrawal of recognition was based on a mere whim. In this case, I adhere to precisely the same rationale I expressed in Southern Wipers, Inc., supra, and Taft Broadcasting, 201 NLRB No. 113, 82 LRRM 1338. I think it is noteworthy that Member Jenkins joined me in my rationale in the Southern Wipers case and Member Penello joined me in my rationale in the Taft Broadcasting case. In the last paragraph of the Taft Broadcasting case we said:

> 'In sum, we conclude that, at the time it withdrew recognition, the Respondent had sufficient objective grounds for believing that a majority of the em-

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> ployees no longer desired union representation. Since the General Counsel failed to come forward with evidence that on the refusal-to-bargain date the Union in fact did represent a majority of employees in the unit in question, the allegations in the complaint are found to be without merit.' "

Also, in *Automated Business Systems*, 205 NLRB 35, 84 LRRM 1042, 1049 (1973), both Chairman Miller and member Kennedy voiced separate dissents.

Mr. Kennedy stated the following:[3]

> "The majority is clearly correct in not finding a violation of Section 8(a)(5) of the Act. . . .
>
> "The majority's conclusion with respect to the presumption of majority is contrary to established law. The principles that govern withdrawal of recognition of an incumbent union were articulated by the District of Columbia Circuit Court of Appeals in Lodges 1746 and 743, International Association of Machinists and Aerospace Workers, AFL-CIO [United Aircraft Corporation] v. NLRB, 416 F.2d 809, 811-812, 71 LRRM 2336 (C.A.D.C., 1969). The court stated:
>
> > 'The legal principles relating to withdrawal of recognition of bargaining representatives are well settled. Absent special circumstances, the union enjoys an irrebuttable presumption of majority status for one year after certification. Thereafter, the presumption continues but becomes rebuttable upon a showing of "sufficient evidence to cast serious doubt on the union's continued majority status." *At that point, the burden shifts to the General Counsel*

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3. Neither Chairman Miller nor Board Member Kennedy participated in the Board's decision in the instant case.

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to prove that, on the critical date, the union in fact represented a majority of the employees.'

"The Court's view as to the burden of proof, with which the majority expressly disagrees, is in accord with the Board's view as set forth in Stoner Rubber Company, Inc., 123 NLRB 1440, 44 LRRM 1133. The Board recently predicated its dismissal of a complaint alleging a refusal to bargain on this longstanding principle that the General Counsel has the burden of proving that the union, in fact, represents a majority of the employees. Taft Broadcasting, WDAF-TV, AM-FM, 201 NLRB No. 113, 82 LRRM 1338. We there said: 'Since the General Counsel failed to come forward with evidence that on the refusal-to-bargain date the Union in fact did represent a majority of employees in the unit in question the allegations in the complaint are found to be without merit.'

". . . The Dayton Motels, Inc., case, cited in footnote 17 above, is clearly in accord with my view of the applicable law. The Court stated:

'In order to establish that an employer's withdrawal of recognition and refusal to bargain with an incumbent union transgresses Section 8(a)(5) of the Act, the burden of proof is upon the Board to show that the union actually represented a majority of the employees in an appropriate unit. Machinists Lodges 1746 & 743 v. NLRB, 416 F.2d 809, 71 LRRM 2336 (D.C. Cir. 1969).

'Failure to prove a majority-status of the Union relieves an employer of any duty to bargain. Maphis Chapman Corp. v. NLRB, 368 F.2d 298, 303, 63 LRRM 2462 (4th Cir. 1966).

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> 'Furthermore, even if the Union is proved to be actually representative of a majority, the employer is not guilty of a Section 8(a)(5) violation if the employer had a reasonably-grounded belief that the union did not represent an uncoerced majority of its employees. Pulley v. NLRB, 395 F.2d 870, 68 LRRM 2464 (6th Cir. 1968); NLRB v. John S. Swift Co., 302 F.2d 342, 50 LRRM 2017 (7th Cir. 1962). A good faith doubt exculpates the employer even if the Union in fact represented a majority of the employees. NLRB v. Ben Duthler, Inc., 395 F.2d 28, 68 LRRM 2324 (6th Cir. 1968).'"

II. Both the Board and Court of Appeals Failed to Apply the Gissel Standards.

The Court of Appeals herein declined to review the Board's bargaining order in light of the standards set forth in *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed. 2d 547 (1969). In *Automated Business Systems* v. *NLRB, supra*, the Court stated:

> ". . . Admittedly, this is not an original organization situation as in *Gissel*, but we think the guidelines established in *Gissel* can be applied to the present situation." 497 F.2d at 267.

and further stated at footnote one:

> "We recognize that distinctions have been drawn between refusals to recognize a union and withdrawal of recognition from a union. See NLRB v. Frick Co., 423 F.2d, 1327, 1331 n. 6 (3d Cir. 1970). We have applied the good faith test in dealing with the presumption of majority status, a test which the Board, with approval of the Court in *Gissel*, abandoned in refusal to recognize cases. The Board, however still

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applies the good faith test in withdrawal of recognition cases. We think, that the guidelines for issuing a bargaining order in original organization cases can be applied to cases where recognition of a certified union has been withdrawn. . . ."

The Court in *Automated Business Systems* v. *NLRB, supra,* then went on to find that the Board's decision and explanation for its order did not undertake the analysis required by *Gissel, supra,* and it remanded the case to the Board for the purpose of making the analysis.

III. Turnover and Expansion of Bargaining Unit Are Sufficient Evidence to Cast Doubt on the Union's Continuing Majority Status.

The Court of Appeals in disagreement with the Law Judge was not "impressed" with the substantial turnover and considerable expansion of the bargaining unit. While the Eighth Circuit Court of Appeals in *National Cash Register* v. *National Labor Relations Board,* 494 F.2d 189 (1974) a more recent Eighth Circuit Court of Appeals case than *NLRB* v. *Little Rock Downtowner, Inc.,* 414 F.2d 1084 (1969) wherein there were 71 terminations within a bargaining unit consisting of 222 employees stated:

> "Nevertheless, it is clear that a turnover in the number shown here could conceivably affect the majority status of a bargaining representative."

Other Court of Appeals decisions following this view are *Ingress Plastene, Inc.* v. *NLRB,* 430 F.2d 542 (7th Cir. 1970); *NLRB* v. *Laystrom Mfg. Co.,* 359 F.2d 799 (7th Cir. 1966), *den. enf. of* 151 NLRB No. 144; *Capital Aviation, Inc.* v. *NLRB,* 355 F.2d 875, 877 (7th Cir. 1966); and *NLRB* v. *H.P. Wasson and Company,* 422 F.2d 558 (7th Cir. 1970) wherein the Court held that a "large turnover and the

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decrease in check off cards could reasonably give rise to genuine doubts of a certified union's continuing majority support."

The questions presented herein which need to be answered are of paramount importance to the administration of labor relations statutes and the enforcement of the refusal to bargain provisions of the Labor Management Relations Act. Continuation of the conflicting views between Board members and Courts of Appeals as demonstrated herein places a needless burden upon the Board, the Courts and rights of employees protected by Section 7 of the Labor Management Relations Act as well as employers who have an obligation pursuant to the Act to question a union's majority status where the appropriate facts become evident.

It is respectfully submitted, that this case provides this Court with an excellent vehicle to decide issues of paramount importance to the administration of the nation's labor relations law, which have been recognized by other Courts of Appeals and the members of the National Labor Relations Board as in disagreement and as remaining unsettled.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM G. HAYNES
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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM, 1975

No. 74-1421

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KING RADIO CORPORATION,
Respondent,

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,
Intervenor.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

Alan D. Longman, Attorney, National Labor Relations Board (Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Patrick Hardin, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and William H. DuRoss, III, Attorney, National Labor Relations Board, on the brief) for Petitioner.

William G. Haynes (Eidson, Lewis, Porter & Haynes on the brief) for Respondent.

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Blake, Uhlig & Funk and Kane and Koons, Of Counsel, filed a brief for Intervenor.

Before BREITENSTEIN, McWILLIAMS and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

For the third time in six years the National Labor Relations Board asks us to enforce an award against King Radio Corporation requiring it to bargain with the Union. No contract has been made. Employer withdrew its recognition of Union and refused to bargain. Board sustained an unfair labor practice charge filed by Union and ordered Employer to bargain. We enforce the award.

Union was certified as exclusive bargaining representative of an appropriate unit of employees in August, 1966. In King Radio Corporation v. National Labor Relations Board, 10 Cir., 398 F.2d 14, we enforced a Board award holding Employer guilty of various unfair practices and requiring it to bargain with Union. Over a year later, in 1969, the controversy was back with us. In National Labor Relations Board v. King Radio Corporation, 10 Cir., 416 F.2d 569, cert. denied 397 U.S. 1007, we enforced those portions of an award requiring back pay and bargaining.

After denial of certiorari in the last case, the General Counsel and Employer filed a joint motion for clarification of the award. On October 7, 1971, Board made a clarifying order having to do with back wages, not duty to bargain. See 193 NLRB 614.

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In the 40-month period from October 9, 1968, to February 18, 1972, Employer and Union met for collective bargaining on 21 occasions. At the last mentioned session two items, wages and checkoff, prevented total agreement. Union offered for the first time to pay Employer two or three cents a card for processing dues checkoff. Employer rejected the offer. At the February 18 meeting Employer did not express a doubt as to Union's majority status.

With regard to the February 18 meeting Board said that "at no time in the history of this bargaining relationship have the parties been so close to reaching an agreement." During the next three months Union representative tried several times to reach Employer representative on the phone and his calls were not returned. In the period May 22 to July 27 Union representative wrote three letters to Employer representative requesting resumption of bargaining negotiations. There was no response. On August 3, Union filed an unfair labor practice charge against Employer. Eight days later Employer wrote Union that it had no obligation to continue a "fruitless marathon of bargaining," and questioned, for the first time, the majority status of Union on the basis of increase in unit size and employee turnover.

At the time of the 1966 election, 343 employees in the unit were eligible to vote. The result was 182 for Union and 114 against. On August 9, 1972, Employer had 876 employees within the unit. In the period 1967-1972 Employer hired 4,214 workers and terminated 3,423. Twenty-two of those employed on the date of the election remained employed in August, 1972.

The Administrative Law Judge found that when Employer withdrew recognition it had sufficient grounds for

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belief that a majority of the unit employees no longer wanted union representation. Board disagreed saying (1) Employer did not present objective facts showing good faith doubt of majority status; (2) the claim of doubt as to majority status was an afterthought in response to Union's unfair practice charge; and (3) Employer's action was another effort to avoid an agreement with Union. Board went on to hold, 208 NLRB No. 82:

> "This is clear from the fact that during the critical negotiating sessions involved herein and following them up until August 11, 1972, the Respondent had never made a claim to the Union that it doubted its majority status even though the factors upon which it relied to establish the alleged doubt in this case were well known to the Respondent during all critical times herein."

More than a year passed after Union certification without a contract. Thereafter, the presumption of representative status is rebuttable and an employer may refuse to bargain if he has a good faith, reasonable doubt of Union majority status. National Labor Relations Board v. Frick Company, 3 Cir., 423 F.2d 1327, 1330-1331. Proof of an employer's frame of mind is not enough. He must show a rational basis in fact for doubt of majority status. National Labor Relations Board v. Rish Equipment Company, 4 Cir., 407 F.2d 1098, 1101. Employee turnover alone does not provide a reasonable basis for concluding that a union has lost majority status. National Labor Relations Board v. Little Rock Downtowner, Inc., 8 Cir., 414 F.2d 1084, 1091.

Employer emphasizes disagreement among Board members as to the application of the law when an employer withdraws recognition. Differences of opinion have arisen

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over the burden placed on the General Counsel in such a situation and other related matters. We decline to be concerned with such problems and we make no attempt to reconcile Board decisions. In Brooks v. National Labor Relations Board, 348 U.S. 96, 104, the Court, in discussing an employer's refusal to bargain when he doubts a union's continuing majority, said: "This, too, is a matter appropriately determined by the Board's administrative authority."

Employer urges that bargaining had reached an impasse. Board found no merit in this contention. We rejected the claim of impasse when the controversy was here the second time, 416 F.2d at 571. We agree with Board that the February 18 meeting showed agreement on many issues and progress on those then in disagreement. Determination of an impasse is a fact question peculiarly within Board expertise. National Labor Relations Board v. J. H. Bonck Company, 5 Cir., 424 F.2d 634, 638. The record before us sustains Board's action.

We reject Board's argument that Employer cannot question majority status because it has not paid the back pay award. More than three years has gone by since Board clarified that award. At argument Board attorneys said that the award had not yet been computed and paid. In 1972 a Board attorney estimated that "back pay would be around $25,000." Employer offered to pay that amount and the offer was declined. The failure of Board to compute the award is inexcusable. Board cannot now take advantage of a situation of its own making.

The record shows no indication of employee opposition to Union. Employer's reliance on increase in unit size and personnel turnover does not impress us. Claim of loss of majority status was not made until after Union

filed an unfair practice charge based on failure to negotiate. Board was justified in finding that Employer was not bargaining in good faith.

Neither Employer, Union, nor Board can be proud of the manner in which this controversy has been handled. In 1968 we ordered enforcement of an order to bargain. In 1969 we ordered enforcement of an order requiring back pay and bargaining. It is now 1975. The parties have neither agreed nor reached an impasse, and the back pay has not been computed by Board. A prompt conclusion of the dispute is desirable.

The award is enforced. The mandate shall issue forthwith.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 74-1421

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KING RADIO CORPORATION,
Respondent,

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,
Intervenor.

Judgment

(Filed March 5, 1975)

Before: Breitenstein, McWilliams and Doyle, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, King Radio Corporation, its officers, agents, successors and assigns on January 22, 1974. The Court heard argument of respective counsel on January 24, 1975, and has considered the briefs and transcript of record filed in this cause. On February 12, 1975, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order.

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ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that King Radio Corporation, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

/s/ Jean S. Breitenstein
Judge, United States Court of Appeals for the Tenth Circuit

DATED: March 5, 1975

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APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 17—CA—5274

KING RADIO CORPORATION

and

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO

Decision and Order

On April 30, 1973, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Administrative Law Judge's Decision in light of the exceptions and briefs and has decided to affirm the Administrative Law Judge's rulings, findings, and conclusions only to the extent consistent herewith.

The Administrative Law Judge found that at the time Respondent withdrew recognition it had sufficient grounds for believing that a majority of unit employees no longer wanted union representation, and the General Counsel has not come forward with any evidence that the Union did

represent a majority of employees. He also found that the General Counsel has failed to prove that since about February 18, 1972, Respondent failed and refused "to furnish the Union with the contract language of items agreed upon, as promised by Respondent." Accordingly, he concluded that the Respondent did not violate Section 8(a)(1) and (5) of the Act and recommended that the complaint be dismised in its entirety. The General Counsel and the Union have filed exceptions to the above findings and recommendations, some of which we, for reasons hereinafter set forth, find meritorious.

The Respondent is engaged in the manufacturing of aircraft radios and related navigational systems in its two plants in Olathe, Kansas. The Union began an organizational campaign at the plants during early March 1966 and requested recognition from the Company about April 12, 1966. A Board-conducted representation election was held on June 30, 1966, which the Union won by a vote of 182 to 114, and the Union was certified by the Board as the bargaining representative of Respondent's production and maintenance employees at the plants on August 19, 1966.[1]

Thereafter, a complaint issued as a result of an unfair labor practice charge filed by the Union and the Board found the Employer violated Section 8(a)(1) and (5) of the Act in cases 166 NLRB 180 and 166 NLRB 649. These Board Decisions were enforced by the United States Court of Appeals, 10th Circuit, on July 22, 1968 (398 F.2d 14). Thereafter, the Board issued its Decision in 172 NLRB

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1. The appropriate unit for purposes of collective bargaining within the meaning of Sec. 9(b) of the Act consists of all production and maintenance employees at the 400 North Rogers Road and 139 South Brockway, Olathe, Kansas, plants of King Radio Corporation, Inc., including plant clericals, but excluding the office clerical employees, accounting department employees, research and development employees, professional employees, guards, and supervisors within the meaning of the Act.

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1051 on July 9, 1968, finding that Respondent had violated Section 8(a)(5) of the Act. This decision was enforced in part by the 10th Circuit Court of Appeals on September 17, 1969 (416 F.2d 596), and certiorari was denied by the United States Supreme Court on April 27, 1970 (397 U.S. 1007). The Board's Decision required that the Respondent:

> Forthwith abrogate, cancel, and disestablish, in all respects, the wage structure system which Respondent unilaterally established and placed into effect for bargaining unit employees on and since February 1, 1967; *provided,* however, (1) that all increased minimum wage rates, whether statutory or otherwise, for all job classifications, placed into effect by Respondent for said unit employees on or since February 1, 1967, shall not be abrogated, reduced, or otherwise changed without bargaining in good faith with the Union thereon, *and* (2) that in all respects other than said increased minimum wage rates (whether statutory or otherwise, for all job classifications) the wage rate progression, system (including automatic wage rate progressions), and all other features of Respondent's wage structure system which were in effect immediately prior to Respondent's said February 1, 1967, unilateral change, shall forthwith be reinstituted and restored, and shall not be changed without bargaining in good faith with the Union thereon.

and

> Forthwith abrogate, cancel, and disestablish all changes in any term or condition of employment of said bargaining unit employees, other than any increase in minimum wage rates (whether statutory or otherwise, for all job classifications) as hereinabove provided, which have been established for said unit employees

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> by Respondent at any time since said unit employees have been represented for collective bargaining by Communication Workers of America, AFL-CIO, unless said changes are bargained in good faith with said Union.

and

> Upon request, bargain in good faith with Communication Workers of America, AFL-CIO, as the exclusive bargaining representative of Respondent's employees in said bargaining unit and embody in a signed contract any agreement reached. For purposes of such bargaining, the period of 1 year following posting by Respondent of the attached notice marked "Appendix" shall be deemed and considered to be the initial certification year of Communication Workers of America, AFL-CIO, and the Board certificate issued to said Union shall be deemed to be amended and conformed accordingly.

The Employer posted the notice to employees pursuant to the Board's Order in the above case.

After the Respondent's petition for writ of certiorari was denied by the Supreme Court, a disagreement arose concerning the interpretation and application of the remedial portions of the Board's Decision in 172 NLRB 1051. In an effort to resolve the controversy, the General Counsel and Respondent filed a joint motion for clarification with the Board, which was granted on June 28, 1971. The Board issued an Order on October 8, 1971 (193 NLRB 614), clarifying its Order.[2]

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2. As noted in the Administrative Law Judge's Decision, fn. 7, backpay has not been effected in the above proceeding and, because of the large number of employees involved, the total may amount to $25,000 or upwards. General Counsel asserts that backpay totaling $25,112.33 is owed to 821 employees and that interest thereon is approximately $4,935.98. How many of the 821 employees that are owed backpay are presently in Respondent's employment is unknown.

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The position of the Charging Party and the General Counsel in this case is that the Respondent illegally withdrew recognition and refused to honor the Charging Party's certification as of August 11, 1972, not because objective circumstances justified doubting the Union's majority as Respondent asserts, but because the parties were close to reaching an agreement on the contract which the Respondent did not want, and because there is an outstanding unfair labor practice case against the Respondent involving unit employees herein which has not been complied with. In addition, the Charging Party and the General Counsel take the position that the Respondent violated Section 8 (a) (5) of the Act by failing to provide the Union with retyped copies of articles agreed upon in the February 18, 1972, bargaining session.

The Respondent's position is that it withdrew recognition or refused to honor the certification because it was justified in doubting the majority status of the Union and that its bases for such doubt were that the unit had expanded considerably since the certification, there had been a great deal of turnover at the plant since the certification, and the Union had allegedly been inactive for certain periods of time.

The Administrative Law Judge found in his Decision that the question of inactivity of the Union in this case is not pertinent in view of the pattern of resumption of bargaining with the Union. We agree with this finding.

Before and after April 13, 1970, the date Respondent posted the notice to employees pursuant to the Board's Decision the Respondent and Union met for purposes of negotiating a collective-bargaining agreement on 21 different occasions. These meetings were held over a period of 40 months on the following dates:

October 9, 1968	May 14, 1969
October 22, 1968	January 27, 1970
November 19, 1968	February 9, 1970
November 20, 1968	February 10, 1970
December 5, 1968	February 11, 1970
December 6, 1968	February 12, 1970
December 10, 1968	August 19, 1971
December 23, 1968	August 24, 1971
December 30, 1968	August 27, 1971
January 9, 1969	December 20, 1971

February 18, 1972

On November 3, 1971, William L. Brown, union representative, sent a letter to William Haynes, attorney for Respondent, requesting a bargaining meeting and stating that Brown "would like to establish a date that is to our mutual agreement in getting back to the bargaining table," and suggested meeting dates of either November 18 or 19, 1971. Receiving no reply from Haynes, Brown sent another letter dated November 19, 1971, requesting that the negotiations resume and suggesting that Respondent suggest the dates for the meeting. By letter dated December 3, 1971, Respondent's counsel answered Brown's letter of November 19 and suggested a meeting date of either December 16 or December 20, 1971.

A meeting was arranged and held on December 20, 1971. Prior to the meeting, Brown had sent the Respondent a complete contract proposal and this proposal was discussed during the 3-hour meeting. The meeting adjourned with the understanding that Haynes wanted to look over the Union's contract proposals and make certain corrections. No representatives of the Respondent stated at that meeting that the Respondent doubted the Union's majority

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status. Brown was to make changes requested by the Respondent at the December 20, 1971, meeting and submit them to the Respondent.

Brown submitted changed or redrafted proposals to Haynes, and another meeting was held on February 18, 1972. During the intervening period, although there were various telephone discussions between Brown and Haynes, Haynes did not question the Union's majority status.

It appears that at the February 18, 1972, meeting many provisions of a contract were agreed to. There is an apparent dispute regarding which particular contract items were agreed to *in toto* at the February 18, 1972, meeting. However, numerous items were agreed to at that particular meeting because of changes made and agreed to at that meeting. Richard Johnson, personnel director for Respondent, noted that there was a change made in the preamble and the item was agreed upon; Respondent submitted to the Union a proposal on management rights, which was agreed upon; an item on new classifications was agreed upon after a change; the Union accepted Respondent's proposal on arbitration; an item on job vacancies and transfers was agreed to after changes; an item on rules, benefits, and privileges was withdrawn by the Union; and an item on subcontracting was agreed to after a change.

It thus appears that the February 18, 1972, meeting was a fruitful bargaining session with considerable progress made toward the completion of a contract. There is agreement that at the conclusion of the February 18, 1972, meeting there were only two items standing in the way of total agreement; namely, wages and dues checkoff. There was considerable discussion of these matters. There was agreement reached on the second- and third-year wages of the contract; agreement was not reached on the first-year wages of the contract, the Union first requesting a 15-

percent increase and then coming down to 10 percent.[3] The Respondent did not move from its position that there would be no increase during the first contract year.[4]

Regarding the dues-checkoff item, Haynes said that he would agree to a checkoff system providing the Union paid him 15 percent for each member's dues collected. Brown acknowledged that he didn't have the authority to do this and, at Haynes' request, Brown tried to get the authority. Brown phoned Stanley Hubbard, area director of the Union, and was instructed to make a counteroffer of 2 or 3 cents a card for processing. This was rejected by the Respondent. This was the first occasion that the Union had offered any payment whatsoever to the Respondent for processing dues checkoff.

At the close of the February 18, 1972, meeting, Brown informed Haynes he would be dealing with Mr. Lovett, a CWA representative, in the future. Haynes said he was withdrawing the "total package," that is, the holiday item, the checkoff item, and the wage item. According to Brown, with regard to the agreed-upon proposals, Haynes stated

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3. Brown said that he mentioned to Haynes that the Union would be bound by the 5.5 percent ceiling of the wage-price freeze in existence at the time, although apparently this was not yet reduced to a firm proposal by Brown. Johnson testified that he "did not hear such a statement" made at the February 18, 1971, session.

4. At the December 20, 1971, meeting, there was agreement on an immediate wage increase at that time. Brown testified:

> Mr. Haynes and the gentleman at the table [Mr. Johnson] asked me to agree to a wage increase for the hourly rated employees. With Christmas coming on and so forth we didn't want to deprive these people of a wage increase and it would have no effect on future bargaining, and I did agree to it and the committee agreed to it and we initialed the proposed increases for these people. . . . We did agree on this wage increase at this time to be effective the third of January 1972. Based upon this, Mr. Haynes felt [on February 18, 1972] that there was no wage increase due at the first year of the contract.

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he wanted some language changes made, and he (Brown) agreed at Johnson's suggestion to retype and submit the entire contract to the Union for proofreading with no intent to change any substantive terms. At no time during the February 18, 1972, meeting did any representative of the Respondent express any doubt of the Union's majority status.

Thereafter, Brown submitted a memorandum to Union Representative Lovett, dated February 18, 1972, stating:

Subject: Bargaining—King Radio Corporation

Final offer made by the Company as of this date was as follows:

3 year contract

no raise the first year

5% 1st Anniversary

5% 2nd

15% to activate dues deduction to be paid to the Company by the Union

Veterans Day

Final offer made by the Union:

10% 1st year

5% 2nd year

5% 3rd year

Dues deduction and the Union will pay .02 per card per month for processing.

Veterans Day

We are apart on three (3) items - - - wages, dues deduction and Veterans Day withdrawn by the Company. All other Articles acceptable.

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About the middle of March 1972, Paul Scales, CWA staff representative, assumed the responsibilities of continuing the bargaining negotiations with the Respondent. In the early part of April 1972, Scales attempted to contact Haynes by leaving a message at Haynes' office. Haynes did not return this call and Scales called Haynes again about the early part of May 1972. Again, Haynes did not return the call. Scales called a third time on May 22, 1972, and did speak with Haynes. On the same date, Scales sent a letter to Haynes confirming the phone conversation and stating that "I will be waiting for a projected date [to continue bargaining negotiations] from you." There being no response from Haynes, Scales sent a second letter to him on July 17, 1972. Receiving no reply Scales sent a third letter to Haynes dated July 27, 1972, again requesting resumption of negotiations.

Respondent's counsel, Haynes, sent to Scales the following letter dated August 11, 1972:

> I'm sorry for the delay in responding to your letter dated July 27, 1972, as I have been away from the office for the past two weeks.
>
> As you know, Company representatives have met with representatives of the Union on approximately five different occasions for a series of meetings ranging from five to fifteen meetings during the past five (5) years, during which time written proposals and counter proposals have been exchanged in an effort to reach an agreement on wages, hours and other conditions of employment. The last series of meetings were conducted through November and December of 1971 and January of 1972. Although these meetings resulted in agreement on a number of subjects disagreement remained on others and the disagreement was never resolved. The Company has not changed

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its position on those subjects which were in disagreement and it has never been advised that the Union has changed its position. The Company does not believe that it is obligated to continue a "fruitless marathon of bargaining" indefinitely, and thus believes it has met its bargaining obligation.

In the interim, the Company has experienced almost 100% turnover in bargaining unit employees and there is less than 20% of the employees employed with the Company that were employed in 1966 when the NLRB election was conducted. Further, the number of employees in the bargaining unit has more than doubled.

Moreover, the Union representation for bargaining unit employees has been nonexistent except to request a return to the bargaining table on an intermittent, almost annual basis, to rediscuss, with no change in position, subjects which had been previously discussed, and continue to be in disagreement.

Accordingly, the Company believes it has met its bargaining obligation. The majority status of the Union has been affected by the large turnover of employees as well as the doubling of the work force within the past year.

On August 29, 1972, Paul Scales replied to Respondent counsel's letter as follows:

I was extremely disappointed to receive your letter to me dated August 11, 1972, wherein you state that continued bargaining between the Union and the Company had developed into a "fruitless marathon of bargaining".

It is my understanding that the last bargaining sessions between you and Mr. Bill Brown had been

very fruitful, in fact much progress was made. I understand the Company and the Union were apart only on first year wages and the cost of payroll deduction of union dues. I also understand from Mr. Brown that at the last bargaining session, which was held February 18, 1972, you had agreed to prepare a contract on all items and send to my office for initialing on all items but the above mentioned items, wages and payroll deduction of union dues. As of this date, of course, we have not received the contract from you.

The Communication Workers of America, AFL-CIO still is a certified representative of all conventional production and maintenance employees of King Radio Corporation, certified by the National Labor Relations Board. Consequently, you as the bargaining agent for the company and I, as the bargaining representative for the union have a responsibility to continue bargaining until such time as a true stalemate has been reached. I do not feel that the point has been reached. I base my thinking on the gains made at the last session with Mr. Brown.

I feel we are close to a settlement and should again meet at the bargaining table in hopes of consummating an agreement.

May I hear from you as to a date to continue bargaining.

Scales assertedly received no response to the above letter.

Richard Johnson, the Company's personnel manager, testified with respect to the Company's turnover in personnel for the years 1967 through 1972. Johnson indicated the number of people employed and the number of people terminated in the hourly classifications, which is the bargaining unit, as follows:

Year	Employed	Terminated
1967	593*	371
1968	702	554
1969	580	504
1970	208	353
1971	558	453
1972	1,573	1,188
	4,214	3,423

*Does not include 1967.

It was stipulated by the parties that there were 343 eligible voters in the unit at the time of the June 1966 election. There were 182 votes cast for the Union, and 114 against it, with 3 void ballots and 26 challenged ballots. Johnson testified that beginning in February 1968 the Company began preparing weekly reports on the number of employees in each classification and on August 9, 1972, the Company had 876 hourly employees who were employed within the bargaining unit.

Johnson further testified that the Company's questioning the majority status of the Union "was based upon the turnover of personnel . . . the increase of the work complement in the bargaining unit . . . plus the fact we had observed or seen or heard of absolutely no union activity in the plant." Johnson claimed that "annually since 1967" the Company has not "been notified as to local representation within the plant," however, the Company has "recently been notified of a change in local representation in the plant." Johnson said that since March 1967 he could recall one visit by the local union president, and that was in 1971, although he acknowledged that during the strike employees carried picket signs at the plant.

On the above facts, the Administrative Law Judge found that at the time the Respondent withdrew recognition the Respondent had sufficient grounds for believing that a majority of the unit employees no longer wanted union representation, and the General Counsel has not come forward with any evidence that the Union did represent a majority of employees. Therefore, he concluded the Respondent did not violate Section 8(a)(1) and (5) of the Act. He further found, based on credibility resolutions, that the General Counsel failed to prove that since about February 18, 1972, Respondent failed and refused "to furnish the Union with the contract language of items agreed upon, as promised by Respondent."

We do not agree with the Administrative Law Judge's finding that the Respondent had sufficient grounds for believing that a majority of the unit employees no longer wanted union representation.

The law applicable to the withdrawal or failure to honor the certification of a union has been succinctly stated in *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1483, as follows:

> Absent unusual circumstances, there is an irrebuttable presumption that the majority status of a certified union continues for 1 year from the date of certification. After the first year the certification still creates a presumption of majority status, but the presumption is normally rebuttable by an affirmative showing that the union no longer commands a majority. Moreover, where the certificate is a year or more old an employer may withhold further bargaining without violating the Act and insist that the union reestablish its statutory representative status if, but only if, he in good faith has a reasonable doubt of the union's continuing majority.

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Two prerequisites for establishing whether or not an employer was acting properly in questioning a certified union's majority status, as set forth in *Celanese Corporation of America*, 95 NLRB 664, 673, are (1) that the employer has "some reasonable grounds for believing the union had lost its majority status," and (2) "the majority issue must *not* have been raised by the employer in a context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." In *Viking Lithographers, Inc.*, 184 NLRB No. 16, the Board concluded that in a context free of unfair labor practices or even of manifest union animus the factors relied on by the employer provided an objective basis which could properly furnish reasonable grounds for the respondent to believe that the union had lost its majority status.[5] Similarly, in *Southern Wipers, Inc.*, 192 NLRB 816, the Board held that an employer had sufficient objective considerations on which to ground a belief that a majority of the employees no longer desired union representation. As in *Viking Lithographers*, the employer had not engaged in any unfair labor practices.

More recently, in *Emerson Manufacturing Company, Inc.*, 200 NLRB No. 33, the Board set forth its rationale on the conditions precedent to be met by an employer in refusing to negotiate further with a union under similar circumstances as exists in the instant case. One consideration, as expressed in the *Emerson* case, is as follows:

> The initial question to be considered is whether the record as a whole supports a finding that doubt of the Union's continued majority was the real reason for the Respondent's refusal to bargain.

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5. Citing *Lloyd McKee Motors, Inc.*, 170 NLRB 1278.

We turn first to the issue of whether or not Respondent in this case had objective grounds for a reasonable belief that the Union had lost its majority status. We agree with the Administrative Law Judge that the question of the inactivity of the Union in this case is not pertinent in view of the pattern of resumption of bargaining with the Union. With this exclusion, the only two grounds that Respondent could properly rely on for belief of a loss of majority status by the Union are the increase in size of the unit from the time of the certification until August 1972, and the large amount of turnover in the unit. With respect to these two grounds, the Board has held on numerous occasions, and specifically, in *Laystrom Manufacturing Co., supra,* and *Emerson Manufacturing Co., Inc., supra,* that new employees will be presumed to support a union in the same ratio as those they may replace. Thus, because the Union maintained a majority status at the time of the certification, it must be presumed that it still maintains its majority status absent other strong evidence which may form a reasonable basis for believing that the Union has lost is majority status. In this case, we do not find the required other strong evidence which may form a reasonable basis for believing that the Union lost its majority status.

The Administrative Law Judge relies upon two cases, *Taft Broadcasting, WDAF-TV, AM-FM,* 201 NLRB No. 113, and *Stoner Rubber Company, Inc.,* 123 NLRB 1440, to support his conclusion that the Respondent had a good-faith doubt of the Union's majority status. We find that such reliance is misplaced in view of the fact that those two cases can clearly be distinguished from the instant case. Thus, in *Taft,* the conclusion that the employer had a sufficient basis for doubt of the union's majority status was reached after a consideration of a number of objective factors, including an employee poll which showed

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that the union did not have majority support, some expression of employee dissatisfaction with the union, the fact that the union had been certified for more than 20 years and had never negotiated a contract with the employer, employee turnover, and the fact that the employer had been engaged in continuous good-faith bargaining for 4 years in an attempt to negotiate a contract. None of these factors is present in the instant case except for turnover. Also, in the *Taft* decision, the Board stated that the prior Board Order was "extremely narrow in scope . . . and would not be apt to have detrimental or lasting effects upon employees in the unit." In the instant case, however, the three prior Board Orders and court decrees are broad in scope and it cannot be said that the payment of a total of approximately $30,000 to past and present unit employees as a result of Respondent's prior violations of the Act would not be apt to have lasting effects upon employees in the unit, at least until a reasonable time after the payments are made to the employees.

Further, in the *Taft* case, the Board placed some reliance on the fact that a voluntary poll of employees was taken, the results of which showed that the union therein did not have majority support. Based on the above facts, it is clear that the objective considerations in *Taft* were much broader than those in this case.

Prior unremedied unfair labor practices preclude an employer from questioning the majority status of the union. *C & C Plywood Corporation and Veneers, Inc.*, 163 NLRB 1022; *Miami Coca-Cola Bottling Co. d/b/a Key West Coca-Cola Bottling Co.*, 150 NLRB 892. As stated in *Taft*, however, the nature of the unremedied violation is a factor to be considered.

With respect to the *Stoner* case, the facts there were also quite different from those in the instant case. There,

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the union had won an election by only a small majority 14 months prior to the withdrawal of recognition. A strike had been in progress approximately 5 months during which there had been no bargaining meetings and the union had not communicated with the respondent for a period of 3 months. On the date of withdrawal of recognition, the plant was operating with a complement of 18 permanent replacements for strikers and a fairly high percentage of strikers who had crossed the picket line to return to work. In the instant case, the Union won the original election by a much larger percentage than did the union in the *Stoner* case. Also at the time of Respondent's withdrawal of recognition, the strike was over, unlike the *Stoner* case where the strike was continuing. Finally, contrary to the facts in *Stoner*, here, just prior to the withdrawal of recognition, there had been a great deal of contact between the parties, and the Union had been making every effort to sit down at the bargaining table with the Respondent although such bargaining had been successfully avoided in bad faith by the Respondent for approximately 5 months. Thus, the facts presented here are quite different from the facts in *Stoner*. As the Board has held on several occasions, the return of an employee to work by crossing a picket line during a strike, even an economic strike, does not give rise to a presumption that such action demonstrates a rejection of the union as the employee's bargaining representative. See *Frick Company*, 175 NLRB 233; *Palmer Asbestos & Rubber Corporation*, 160 NLRB 723; and *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678, 687 (1944). Thus, without the additional facts present in the *Stoner* case, no conclusion can be reached that those employees crossing the picket lines in the instant case were abandoning their support of the Union.

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Based on the above, it is clear that the Respondent has not established the existence of objective facts establishing a reasonable basis for a good-faith doubt of the Union's majority status as of August 1972, when it withdrew recognition from the Charging Party. It is obvious that the claim of such doubt of the Union's majority status was an afterthought in response to the charge filed by the Union on August 3, 1972, and merely constituted another effort by the Respondent to avoid the possibility of entering into an agreement with the Charging Party. This is clear from the fact that during the critical negotiating sessions involved herein and following them up until August 11, 1972, the Respondent had never made a claim to the Union that it doubted its majority status even though the factors upon which it relied to establish the alleged doubt in this case were well known to the Respondent during all critical times herein.

Although the Administrative Law Judge found it unnecessary to rule on the Respondent's contention that an impasse was reached at the conclusion of the February 18, 1972, meeting, we find this contention lacking in merit. The record evidence shows that there was considerable movement by the parties at that bargaining session; that there was agreement on items that had been in contention for years; and that there was even movement in bargaining positions on the two items that remained open. The evidence established that at no time in the history of this bargaining relationship have the parties been so close to reaching an agreement.

Taking into account all the objective considerations on which the Respondent relies, we find that they are insufficient to demonstrate that the Respondent had reasonable grounds for believing that the Union no longer commanded majority employee support at the time of its

refusal to bargain. This, coupled with the fact that the Respondent made clear when it refused to bargain that it did not want to deal further with the Union, i.e., it is not obligated to continue a "fruitless marathon of bargaining," leads us to the conclusion that the Respondent's asserted doubt of majority lacked sufficient basis to justify its refusal to bargain. We conclude from Respondent's conduct in delaying further negotiations by its delay in answering the communications of Scales to resume bargaining, its admitted statement that an agreement was close at hand, and its unsupportable position that an impasse was reached, that the Respondent was not bargaining in good faith.[6]

Accordingly, we find that the Union at all times material herein was, and now is, the exclusive representative by virtue of Section 9(a) of the Act of the Respondent's employees in the appropriate unit described in footnote 1, above, and that the Respondent, by its refusal to bargain with the Union on August 11, 1972, and thereafter, violated Section 8(a)(5) and (1) of the Act, thereby engaging in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices proscribed by Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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6. Because the Administrative Law Judge based his finding that the General Counsel has failed to prove that since on or about February 18, 1972, Respondent failed to and refused "to furnish the Union with the contract language of items agreed upon, as promised by Respondent" on credibility, we are reluctant to disturb this finding.

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Having found that the Respondent unlawfully refused to bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit described in footnote 1, above, we shall order it do so, upon request, and, if an agreement is reached, to embody the agreement in a signed contract.[7]

Conclusions of Law

1. The Respondent is an employer engaged in commerce with the meaning of the Act.

2. Communication Workers of America, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act, and at all times material has been the exclusive certified representative of unit employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

3. By failing or refusing to bargain collectively concerning rates of pay, wages, hours of employment, or other terms and conditions of employment with the certified representative of the unit employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board

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7. The Charging Party in its brief has specifically requested that Respondent be ordered to give the Charging Party the option to begin negotiations at the point where they left off at the end of the February 18, 1972, meeting with only two issues outstanding, wages and dues checkoff, or to start over from the beginning. We deem it unnecessary to provide specifically for such an option in our Order, inasmuch as our Order requires the Respondent, upon request, to bargain in good faith with the Union.

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hereby orders that Respondent, King Radio Corporation, Olathe, Kansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively concerning rates of pay, wages, hours of employment, or other terms and conditions of employment with Communication Workers of America, AFL—CIO, as the exclusive representative of its employees in the following appropriate unit:

> All production and maintenance employees employed at the 400 North Rogers Road and 139 South Brockway, Olathe, Kansas, plants of King Radio Corporation, Inc., including plant clericals, but excluding office clerical employees, accounting department employees, research and development employees, professional employees, guards, and supervisors within the meaning of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action found necessary to effectuate the purposes of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of the employees in the above-described appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a written signed agreement.

(b) Post at its plants at 400 North Rogers Road and 139 South Brockway, Olathe, Kansas, copies of the attached

notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed in as far as it alleges violations not found herein.

Dated, Washington, D.C., January 22, 1974.

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

(Seal) National Labor Relations Board

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8. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to recognize and bargain collectively in good faith with Communication Workers of America, AFL—CIO, as the exclusive representative of the employees in the appropriate unit stated below.

All production and maintenance employees employed at 400 North Rogers Road and 139 South Brockway, Olathe, Kansas, plants of King Radio Corporation, Inc., including office clerical employees, but excluding accounting department employees, research and development employees, professional employees, guards, and supervisors within the meaning of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the National Labor Relations Act.

WE WILL, upon request, recognize and bargain collectively in good faith with the above-named Union as the exclusive representative of the employees in the appropriate unit with respect to wages, hours, and conditions of employment, and, if an understanding is reached, we will embody such understanding in a signed agreement.

King Radio Corporation
(Employer)

Dated ..... By .....
(Representative) (Title)

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This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616—Two Gateway Center, Fourth at State, Kansas City, Kansas 64101, Telephone 816—374—4518.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 17-CA-5274

KING RADIO CORPORATION

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO.

Gerald A. Wacknov, Esq., for the General Counsel.

Robert E. Funk, Jr., Esq., of Little Rock, Arkansas, for Charging Party Union.

William G. Haynes, Esq., of Topeka, Kansas, for Respondent Company.

DECISION

FRANK H. ITKIN, Administrative Law Judge: This case was tried at Kansas City, Kansas, on March 1, 1973. The unfair labor practice charge was filed by the Union on August 3, 1972. The complaint, which issued on Decem-

ber 22, 1972 and was amended on March 1, 1973, alleges that Respondent Company violated Sections 8(a)(1) and (5) of the National Labor Relations Act by failing and refusing since about February 18, 1972 to furnish the Union with certain agreed upon contract items as promised by Respondent and, further, by failing and refusing since about August 11, 1972 to recognize and bargain with the Union as the duly certified bargaining representative of the Company's employees in an appropriate unit. Respondent, in denying the alleged unfair labor practices, claims a good faith doubt as to the Union's continued majority status.[1]

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by counsel, I make the following:

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits and I find and conclude that Respondent Company, a corporation of Kansas, has been engaged in the manufacture of airplane radios and related items at its two facilities in Olathe, Kansas; that in the course and conduct of its business operations Respondent annually purchases materials and products in excess of $50,000 from suppliers located outside of the State of Kansas and annually sells goods and products in excess of $50,000 to customers located outside the State of Kansas; and that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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1. Alternatively, counsel for Respondent asserts that "a genuine impasse was * * * reached at the conclusion of the February 18 meeting * * *" (br. p. 21).

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The complaint alleges, the answer admits and I find and conclude that the Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Background; The Prior Proceedings

As stated, the Company manufactures airplane radios and related items at its two plants in Olathe, Kansas. The Union began an organizational campaign at the plants during early March 1966 and requested recognition from the Company about April 12, 1966; a Board-conducted representation election was held on June 30, 1966, which the Union won by a vote of 182 to 114; and the Union was certified by the Board as the bargaining representative of the Company's production and maintenance employees at the plants on August 19, 1966.[2]

Thereafter, the Company was involved in three related unfair labor practice proceedings. In the first proceeding, 166 NLRB 649 which issued on June 30, 1967, the Board found that the Company violated Section 8(a)(1) of the Act by counsel's coercive interrogation of an employee and by discriminatorily promulgating a no-solicitation rule. The Board found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally adopting a no-

2. The complaint alleges, the answer admits and I find and conclude that "all production and maintenance employees at the 400 North Rogers Road and 139 South Brockway, Olathe, Kansas, plants of King Radio Corporation, Inc., including plant clericals, but excluding the office clerical employees, accounting department employees, research and development employees, and professional employees, guards, and supervisors within the meaning of the Act," constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act; that on June 30, 1966, a majority of the employees of Respondent in the above unit in a secret ballot election designated and selected the Union as their representative for the purposes of collective bargaining with Respondent; and that on August 19, 1966, the Union was certified as the exclusive collective bargaining representative of the employees in the unit.

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talking rule and instituting the use of warning slips, cancelling payroll deductions for savings bonds, establishing a mandatory retirement policy and retiring an employee under that policy, changing plant clericals from weekly to bi-weekly paydays and by delaying bargaining after the representation election in order to undermine the Union. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging some four employees because of their Union activities and by suspending an employee for violating the no-solicitation rule.[3] The Court of Appeals for the Tenth Circuit sustained the Board's unfair labor practice findings and enforced its order on July 22, 1968, in 398 F. 2d 14.

In another proceeding, 166 NLRB 180 which issued on June 28, 1967, the Board found that the Company violated Section 8(a)(1) of the Act by discharging a supervisor and placing another supervisor on probation because they gave testimony adverse to the Company in the earlier proceeding and by placing on probation and discharging another supervisor because she appeared at the Board hearing in response to a subpena from the General Counsel.[4] The Court of Appeals also sustained these findings and enforced the Board's order on July 22, 1968, in 398 F. 2d 14.

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3. The Board's order directs the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with the employees' Section 7 rights; to offer reinstatement with backpay to the unlawfully discharged employees; to rescind the mandatory retirement policy; to expunge from personnel records all warning notices issued under its new warning rule; to resume payroll deductions for savings bonds upon request; to bargain upon request with the Union; and to post the required notice.

4. The Board's order directs the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with employee Section 7 rights; to offer reinstatement to the discharged supervisors with backpay; to expunge from personnel records all reference to production supervisors being placed on probation; and to post the required notice.

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Negotiations between the Company and the Union commenced during October 1966. In the third proceeding, 172 NLRB 1051 which issued on July 9, 1968, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by conducting bargaining negotiations without a sincere desire to reach agreement; by unilaterally instituting wage changes; by contracting out unit work; and by refusing to supply the Union with relevant information pertaining to the contracting out of unit work. The Board found that the Company violated Section 8(a)(1) by maintaining and discriminatorily enforcing no-talking and warning notice rules and by threatening unfair labor practice strikers with discharge or permanent replacement if they did not return to work by April 3, 1967.[5] The Tenth Circuit enforced in part the Board's decision and order on September 17, 1969, in 416 F. 2d 569. The Court stated:

* * *

> When this case was here in 398 F. 2d 14, to enforce an order of the Board, we sustained the Board's finding to the effect that the no-talking and warning notice rule was a discriminatorily inspired violation of Section 8(a)(1) and (5). The no-talking and warning notice rule involved here is but a continuation of the rule formerly condemned both by the Board and this

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5. The Board found that the employees' strike commencing on March 27, 1967, was caused and prolonged by the Company's unfair labor practices and by its failure to rectify previous unfair labor practices.

The Board's order requires the Company to cease and desist from the unfair labor practices found; to abrogate the unilaterally established wage system; to bargain in good faith; to reinstate upon request all employees who went on strike to their former or substantially equivalent positions; and to post the required notice.

Court. We again sustain the finding and order of the Board based upon the condemned practice.

* * *

This brings us to the unilateral wage changes in the bargaining unit found to be a Section 8(a)(5) and (1) violation. Respondent suggests that a part of the wage change was required by the federally established minimum wage and prompted a good faith wage increase for all bargaining unit employees.

This argument seems plausible on its face. But the Board thought, not without justification, that the wage changes instituted as they were during negotiations on that very subject, were suspect of an 8(a)(5) violation. And when considered with the fact that the wage increases were inequitably distributed among the employees in the bargaining unit without regard to merit, a clear violation was shown.

* * *

The most then that can be said for respondent's position is that the unilateral wage changes were instituted after the point of impasse had been reached. Respondent insists that they were so instituted. The Board found to the contrary. And we quite agree. The wage changes were instituted during purported negotiations concerning that very subject. And if respondent was not bargaining in fact, it was not bargaining in good faith. And the violation is clearly manifest.

* * *

The Board found that the strike was an unfair labor practice strike from its inception and has been prolonged by the unfair labor practices of respondent.

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> And we sustain that finding as supported by the evidence.
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> * * *
>
> The Board found respondent violated Section 8(a)(1) by sending to the striking employees a letter threatening them with loss of employment and benefits unless they returned to work by a designated date. Respondent denied the letter was an unfair labor practice because the strike was economic in nature. This contention has been disposed of by our characterization of the strike.[6]
>
> * * *

On March 30, 1970, the Supreme Court denied the Company's petition for a writ of certiorari, 397 U.S. 1007.

Thereafter, on June 28, 1971, the Board issued an order in the above proceeding granting a joint motion for clarification of its previous order. And, on October 7, 1971, the Board issued an order of clarification, reported at 193 NLRB No. 98. After reciting the disputed portion of the earlier order and the positions of the parties, the Board held:

> * * *
>
> We find no justification for reading the Order in the manner now suggested by the Respondent. On the contrary, the Respondent itself previously recognized the Order as demanding what the General Counsel contends it does, for in its brief to the court of appeals in the instant case the Respondent stated:

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6. The Court noted that the "Board found that Respondent contracted bargaining unit work to a third party from April to June 1967, without notice to or bargaining with the Union concerning the work, in violation of Section 8(a)(5) and (1) * * *." The Court declined to enforce the Board's order in this and related aspects.

> The Board's order apparently intends to require the Company to reinstitute the progression increases of 5 cents for four consecutive months for employees who were below the $1.40 an hour rate on February 1, 1967, totally disregarding the Company's increasing those employees from $1.25 to $1.40 an hour, at the same time granting them an additional 10 cents to $1.50 an hour, after 60 days of employment, and 5 [cent] increases each 90 days thereafter . . . .
>
> We agree that this is the intention of the Board's Order and see no reason to construe it otherwise. * * * The Respondent was directed forthwith to reinstitute the wage rate progressions in effect prior to February 1, 1967, thereby paying to its employees all increments upward from the minimum wage rates (statutory or otherwise) that they would have received had the wage progression system not been unilaterally changed. The Order did not, as contended by the General Counsel, either explicitly or implicitly direct the Respondent to reimburse the employees for any increments they failed to receive from the time the progression system was changed unilaterally up to the time the formula for remedying the unfair labor practice was set forth by the Board. Instead, the Board's Order, in directing reconstitution of the wage rate progressions forthwith, fixes the date of Respondent's obligation as of the date of the Order; it contemplates payment of the increases due under the reconstituted progression system from the date of the Order forward, until changed after bargaining as [required] by the Act. [Footnote omitted]

The Board's order of clarification directs "the Respondent to reconstitute and restore its wage rate progression in existence immediately prior to the changes adopted on

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February 1, 1967, such restoration not to be restricted, limited or diminished by that provision of the [earlier] order directing Respondent to retain its increased minimum wage rates."[7]

III. The Evidence Pertaining To The Company's Withdrawal of Recognition From The Union

William L. Brown testified that he acted as negotiator on behalf of the Union with the Company from about August 1971 to February 1972. Brown explained that after he became the Union's negotiator, he went to Company Personnel Manager Richard Johnson, "to introduce [himself] and to assume the responsibilities of bargaining." According to Brown, Johnson stated that William G. Haynes, Respondent's counsel, "was handling the bargaining * * *." Brown testified that he later telephoned Haynes in an attempt "to set up an appointment * * * so we could continue with the bargaining" and, on November 3, 1971, sent Haynes a letter stating in part:

* * *

> This is a request for future bargaining on contract between King Radio Corporation and the Communications Workers of America. I would like to establish a date that is to our mutual agreement in getting back to the bargaining table.

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7. According to counsel, backpay has not been effected in the above proceeding and, because of the large number of employees involved, may amount to $25,000 or upwards. Counsel for General Counsel asserts in his post-hearing brief (p. 2): "* * * subject to correction, it now appears that backpay totaling $25,112.33 is owed to 821 employees and that the interest thereon to date totals about $4,935.98. How many of the 821 employees owed backpay are presently in Respondent's employment is unknown." And, on the record before me, it is uncontroverted that Respondent has complied with the Board's orders in all other respects.

> I am free for a meeting on the 18th or 19th of November, 1971. If these dates are agreeable with you please pick the place and we will be there.

* * *

Brown, as he testified, received no response to his letter and telephoned Haynes approximately three times in a further attempt to "try to establish an appointment * * *." Consequently, on November 19, 1971, Brown sent a letter to Haynes stating in part:

* * *

> Once again I am making a request for future bargaining on a contract between King Corporation and the Communications Workers of America. I would like to establish a date that we can get back to the bargaining table.
>
> In a prior request I recommended the 18th or 19th of November, 1971 which was ignored. Now I would recommend that you pick a date, place and time for such bargaining. I am available for daily bargaining around the clock (24 hours a day) until we can reach an agreement.
>
> Quite frankly, I am very disappointed in the fact that you did not return my phone call or answer my letter dated November 3, 1971. Being new as a Staff Representative (no professional) and given a free hand to negotiate an agreement, I would appreciate any and all help you might offer me since I have only held this job two months next week.

* * *

On December 3, 1971, Haynes wrote Brown in part as follows:

* * *

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I want to apologize for the delay in responding to your recent letter suggesting dates to resume negotiations with King Radio Corporation, Inc.

We understood during our last meeting, on Friday, September 24, 1971, with Mr. Hubbard, that he would review the Company's last proposal discussed during that meeting and notify me as to whether or not it was acceptable.

To date, the Company has had no response to proposals submitted and discussed during the September 24 session and the sessions immediately prior thereto.

The Company's negotiating team has been involved in other matters and will not be available to meet again until either December 16 or December 20, 1971. Prior to meeting, however, we would like to receive from you in writing your understanding of agreements previously agreed upon as we are under the impression that all items have been agreed upon other than wages. The Company proposed a wage adjustment during the last session on September 24, and Mr. Hubbard indicated he preferred not to respond to the proposal until such time as the Presidential Freeze was lifted. Now that the Freeze is lifted, it would seem appropriate for the Union to respond to the Company's last wage proposal.

* * *

And, on December 14, 1971, Brown wrote Haynes in part as follows:

* * *

As suggested in your letter of December 3, 1971 to me we are agreeable to meet on Monday, December 20, 1971. Please advise place and time.

> The reason for the delay is that I need to include the changes where possible which you requested. Changes should be in your office this week.
>
> * * *

Brown testified that he met with Haynes at the Holiday Inn on December 20, 1971. Also present were Virginia Jamison and Wilma Correl, employees of Respondent serving on the Union's negotiating committee, and Company Vice-President William Holiday and Personnel Manager Richard Johnson. The meeting started about 9 a.m. and ended at noon. Brown recalled that prior to this meeting he had prepared a "complete contract proposal" and mailed copies of the proposal to Haynes in Topeka and to the Company in Olathe. At the meeting, according to Brown, the contract proposal was discussed and there was agreement on items contained in the proposal. Brown testified that "Mr. Haynes wanted to look over [the proposals] * * * he wanted certain corrections made in the proposals that [Brown] had submitted to [Haynes] and there was no date agreed upon for a future meeting." At no time during this meeting, according to Brown, did Haynes or any Company representative express a doubt over the Union's continued majority status as bargaining representative.[8]

Brown testified that about one week later he "had redrafted the proposed changes [Haynes] had made and [he] submitted [them] to [Haynes] in Topeka"; that another bargaining session was scheduled for February 15, 1972; and that Haynes called Brown to change the scheduled meeting date to February 18, 1972. According

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8. Brown testified on cross-examination that "on December 20 the Company and the Union's negotiating team went through each and everyone of [the] articles contained in the package which he proposed and discussed it * * *."

to Brown, Haynes did not question the Union's continued majority status pending the second session.[9] Brown wrote Haynes on January 11, 1972, in part as follows:

* * *

> Bill, I believe that I have incorporated most all of the changes that you required in our last bargaining session on December 22, [sic] 1971. I feel that with the understanding in which both sides approached our last bargaining session, we are only apart on three Articles—Holidays, Wages and Dues Deduction. If you can see your way clear for agreement on these three Articles we have an Agreement.
>
> As you will know after reading this new contract, I have removed stumbling blocks that have been around for years. I have also renumbered the Articles to coincide with your proposals which should help.
>
> I would like to request that, if possible, we sign as tentatively agreed to any or all Articles so that we will not have to rehash or keep going over the same things. I will further state that in the event we cannot reach agreement on the three Articles mentioned above at any time in the future before complete agreement is reached I will tear up or destroy all Articles that have been tentatively agreed to and start over on bargaining if you so desire. We need a date and

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9. On cross-examination, Brown acknowledged that he assumed responsibility for redrafting the provisions which had been tentatively agreed upon at the earlier December 20 meeting and for mailing them to Haynes. Brown acknowledged that previously he had included in his draft items which in fact had not been agreed upon although he attempted to reduce to writing "what [he] understood the parties had tentatively agreed to previously." Brown also acknowledged that the Company submitted to the Union at the subsequent February 18 meeting a "complete counter-proposal."

place for our next bargaining session. I will leave this up to you if some time soon.

* * *

The February 18 meeting was held at the Company's premises. Present for the Union were Brown, Jamison and Correl. Present for the Company were Haynes, Johnson and Holiday. According to Brown, the parties agreed upon the following contract items:

Article II.	Management's Rights;
Article III.	Hours of Work;
Article IV.	Seniority And Loss Of;
ArticleV.	Layoffs And Recalls;
Article VII.	Leaves Of Absence;
Article VIII.	Vacations;
Article IX.	Holidays;
Article XV.	New Classifications;
Article XVII.	Discipline And Discharge;
Article XVIII.	No Strike—No Lockout;
Article XX.	Arbitration;
Article XXI.	Job Vacancies And Transfers;
Article XXIII.	Non-Discrimination;
Article XXVI.	Sub-Contracting;
Article XXXIII.	Duration And Termination.

Brown explained that the above articles had not been agreed upon at the various bargaining sessions conducted prior to the February 18 meeting. Brown testified that items remaining open at the end of the February 18 meeting principally pertained to check-off and wages. According to Brown, the Union had requested a 15 percent wage increase for all hourly-rated employees for the first year of the contract; the Company would grant no rate or

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pay increase for the first year of the contract and would grant a 5 percent increase for the second and third years of the contract. Brown recalled that the item pertaining to a 5 percent increase for the second and third years of the contract was also agreed upon at the February 18 meeting.[10] Further, Brown testified that at the February 18 meeting, the Union had modified its requested wage increase during the first year from 15 to 10 percent; Haynes, however, declined to offer any increase during the first year. As for check-off, Haynes, according to Brown's testimony, would agree to a check-off system "provided the Union paid * * * 15 percent for each member's dues collected." Brown responded that he "didn't have authority to do this * * *." Haynes "offered [Brown] his phone" to get the authority. Brown, after speaking on the telephone with his superior, made "a counter offer [of] two or three cents a card for processing and this offer was rejected by Mr. Haynes." According to Brown, this was the first time the Union had offered Haynes or Respondent any money for check-off purposes.[11]

At the close of the February 18 meeting, Brown assertedly apprised Haynes that Haynes "would be dealing with [Union Representative] Lovett in the future * * *. [Brown] had returned to the Western Electric Company,

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10. At the earlier bargaining session held on December 20, 1971, according to Brown, the Company had "asked [Brown] to agree to a wage increase for the hourly rated employees * * * it would have no effect on future bargaining and [Brown] did agree to it * * *, this wage increase to be effective the 3rd of January 1972." Brown testified that at February 18 meeting, "based upon this, Mr. Haynes felt that there was no wage increase due * * * the first year of the new contract."

11. Brown also testified that at this meeting he had requested a half day holiday for Christmas evening in addition to the half day which the employees had; Haynes' "counter proposal was he would give [the Union] a full holiday which was Veteran's Day, which the committee accepted."

[his] permanent job, and * * * [he] would no longer be representing CWA in this capacity." Haynes, according to Brown, "said he would withdraw his offer of the holiday (see n. 11, *supra*) since [Brown] didn't accept [Haynes'] proposal of the check-off system and the wage, the total package * * *." Further, Brown claimed that "Mr. Haynes wanted minor changes made in the contracts and he agreed to Mr. Johnson's suggestion to retype and submit the entire contract to the [Union's] district office in Kansas City for proofreading with no intent of change in any of these items." Brown testified that at no time during the meeting did Haynes or any Company representative state that they doubted the Union's majority status.[12]

Thereafter, Brown submitted a memorandum to Union Representative Lovett, dated February 18, 1972, stating:

* * *

> Subject: Bargaining—King Radio Corporation
> Final offer made by the Company as of this date was as follows:
>
> 3 year contract.
> no raise the first year.
> 5% 1st anniversary
> 5% 2nd
>
> 15% to activate dues deduction to be paid to the Company by the Union.
>
> Veterans Day

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12. On cross-examination, Brown agreed that Haynes returned to the meeting room shortly after the close of session and said:

> * * * the Company wishes to at this time place you on notice that since no agreement has been reached in full, it desires to withdraw everything tentatively agreed to.

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Final offer made by the Union:

10% 1st year
5% 2nd year
5% 3rd year

Dues deduction and the union will pay .02 per card per month for processing.

Veterans Day

We are apart on three (3) items—wages, dues deduction and Veterans Day withdrawn by the company. All other Articles acceptable.

* * *

Paul F. Scales, a staff representative for the Union, testified that Brown returned to his position with Western Electric and, about March 1972, Lovett designated Scales as the Union's negotiator with King Radio. Scales testified that he telephoned Haynes' office during the early part of April, 1972, "identified [himself] and informed the person [who] answered the phone that [he] desired to talk to Mr. Haynes." Haynes did not return the call. Scales, as he testified, called again during early May and Haynes did not return the call. Scales testified that on May 22 he spoke on the telephone with Haynes. By letter dated May 22, 1972, Scales apprised Haynes as follows:

* * *

Regarding our telephone conversation Monday, May 22, 1972 concerning the status of contract bargaining between King Radio Corporation and Communications Workers of America, I would like to resume talks as soon as possible.

As we discussed in our telephone conversation, yours and my calendar were practically full from now until June 19, 1972. Therefore, I suggest that we try to

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arrange for meetings as soon as possible after June 20, 1972. I will keep my calendar as open as possible on the assumption we will resume talks soon after June 20, 1972.

I will be waiting for a projected date from you.

* * *

Scales testified that he received no response to his letter and, on July 17, 1972, wrote Haynes:

* * *

As of this date I have not received any response to my letter to you dated May 22, 1972 requesting that we resume contract bargaining between the King Radio Corporation and the Communications Workers of America.

I will be available July 25, 27, 28, August 1 and 3, 1972. Perhaps your schedule will permit us to meet on some of the above suggested dates.

I do not object to meeting at the King Radio offices in Olathe, Kansas if this is your preference.

Scales received no response to his July 17 letter and again wrote Haynes on July 27, 1972, requesting a response to his earlier communications.

On August 3, 1972, the Union filed an unfair labor practice charge against Respondent, claiming a violation of Section 8(a)(1) and (5) of the Act. On August 11, 1972, Haynes wrote Scales the following letter:

* * *

I am sorry for the delay in responding to your letter dated July 27, 1972, as I have been away from the office for the past two weeks.

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As you may know, Company representatives have met with representatives of the Union on approximately five different occasions for a series of meetings ranging from five to fifteen meetings during the past five (5) years, during which time written proposals and counter-proposals have been exchanged in an effort to reach an agreement on wages, hours and other conditions of employment. The last series of meetings were conducted through November and December of 1971 and January 1972. Although these meetings resulted in agreement on a number of subjects, disagreement remained on others and this disagreement was never resolved. The Company has not changed its position on those subjects which were in disagreement and it has never been advised that the Union has changed its position. The Company does not believe that it is obligated to continue a "fruitless marathon of bargaining" indefinitely, and thus believes it has met its bargaining obligation.

In the interim, the Company has experienced almost 100% turnover in bargaining unit employees and there is less than 20% of the employees employed with the Company that were employed in 1966 when the N.L.R.B. election was conducted. Further, the number of employees in the bargaining unit has more than doubled.

Moreover, the Union representation for bargaining unit employees has been nonexistent except to request a return to the bargaining table on an intermittent, almost annual basis, to rediscuss, with no change in position, subjects which had been previously discussed, and continue to be in disagreement.

Accordingly, the Company believes it has met its bargaining obligation. The majority status of the

Union has been affected by the large turnover of employees as well as the doubling of the work force within the past year.

* * *

Scales replied on August 29, 1972 to Haynes' letter, stating in part:

* * *

It is my understanding that the last bargaining sessions between you and Mr. Bill Brown had been very fruitful, in fact much progress was made. I understand the Company and the Union were apart only on first year wages and the cost of payroll deduction of union dues. I also understand from Mr. Brown that at the last bargaining session, which was held February 18, 1972, you had agreed to prepare a contract on all items and send to my office for initialing on all items but the above mentioned items, wages and payroll deduction of union dues. As of this date, of course, we have not received the contract from you.

The Communications Workers of America, AFL-CIO still is the certified representative of all conventional production and maintenance employees of King Radio Corporation, certified by the National Labor Relations Board. Consequently, you as the bargaining agent for the company and I, as the bargaining representative for the union have a responsibility to continue bargaining until such time as a true stalemate has been reached. I do not feel that the point has been reached. I base my thinking on the gains made at the last session with Mr. Brown. I feel we are close to a settlement and should again meet at the bargaining table in hopes of consummating an Agreement.

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> May I hear from you as to a date to continue bargaining.
>
> * * *

Scales assertedly received no response to the above letter.

Virginia Jamison, an employee of King Radio for eight years, testified that she attended the February 18 session as a member of the Union's bargaining committee. Jamison claimed that at the end of the February 18 session Haynes said that he was going to have the items that had been agreed upon retyped and he would send a copy thereof to the bargaining committee.

Jack Lovett testified that he is the Union's director for Missouri, Kansas, Arkansas and Illinois. Lovett claimed that prior to February 18, 1972, there was never an occasion when "everything but two items" had been agreed upon. Lovett explained that before February 18 there was never agreement on any year's wages and the Union had not offered the Company any money for payment for check-off.

Richard Johnson, the Company's personnel manager, identified Respondent's Exh. 42 as the proposed agreement submitted by the Company to the Union on December 20, 1971. Johnson testified that on December 20 there "was a discussion on a contract package that Brown proposed" and there was "also discussion of the contract package which Respondent proposed." At the conclusion of that meeting, according to Johnson, "* * * Mr. Brown was to summarize all of the discussions on articles and contract proposals. [Brown] was going to prepare a complete package, a complete proposal, reflecting those things agreed upon and where there were articles and clauses not agreed upon, he was to mail it to" the Company. According to Johnson, Brown "indicated [that] he would

take these [proposals] back and review them as to where [the parties] stood exactly, and then submit a complete package."

Johnson identified Respondent's Exh. 8 as the proposed contract which was mailed to the Company by Brown on February 4, 1972. This proposal was discussed at the February 18 session. Johnson recalled that the *"Preamble"* was acceptable except for some "minor change"; *Article I, Recognition* "was agreed to exactly as Mr. Brown had proposed"; *Article II, Management's Rights* "was agreed to as submitted by the Company"; *Article III, Hours of Work* "was agreed to as submitted by Mr. Brown"; *Article IV, Seniority* "was agreed to by the parties as submitted by Mr. Brown"; *Article V, Layoffs And Recalls* "was agreed to by the parties";[13] *Article VI, Overtime* "was agreed to as submitted" with some change; *Article VII, Leaves of Absence* was agreed to;[14] *Article VIII, Vacations* "was agreed to as proposed by Mr. Brown";[15] *Article IX, Holiday,* "was agreed to"; *Article X, Jury Duty* was agreed upon as proposed by Brown; *Article XI, General Provisions* was agreed upon as submitted by Brown; *Article XII, Plant Visitation* was agreed upon as submitted by Brown; *Article XIII, Funeral Leave* was agreed upon as submitted by Mr. Brown; *Article XIV, Rest Periods* was agreed upon as submitted previously by the Company; *Article XV, New Classifications* "was approved as submitted by Mr. Brown" with "one minor change"; *Article*

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13. Johnson explained that "there was some give and take and agreement reached on an overtime clause as part of this * * *."

14. Johnson explained that "we agreed to take the Union proposal, paragraph 4, and added it to our proposal and then it was agreed to."

15. Johnson explained that "we were apart on Veteran's day and we agreed * * *."

XVI, Mandatory Retirement was "agreed to as submitted by Mr. Brown"; *Article XVII, Discipline And Discharge* was "agreed to as submitted by Mr. Brown"; *Article XVIII, No-Strike—No-Lockout* was "agreed to as submitted by Mr. Brown"; *Article XIX, Grievances* was "agreed to as submitted by Mr. Brown"; *Article XX, Arbitration* was agreed upon as submitted by the Company previously; *Article XXI, Job Vacancies and Transfers* was "agreed to as proposed by the Company" previously and as modified; *Article XXII, Call-In Pay* was "agreed to as submitted by Mr. Brown"; *Article XXIII, Non-Discrimination* was "agreed to as submitted by Mr. Brown"; *Article XXIV, Rules, Benefits And Privileges* was withdrawn by the Union; *Article XXV, Legality Of Contract* was "agreed to as submitted by Mr. Brown"; *Article XXVII, Sub-Contracting* was "agreed to with one word change * * * as submitted by Mr. Brown"; and Article *XXVIII, Payroll Deductions* was rejected by the Company as proposed by Brown.

Johnson testified that the Union proposed at the February 18 session "a 15 percent wage increase now, two wage reopeners which visualized a three-year contract * * * 15 percent the first year and one additional holiday and dues check off." According to Johnson, the Company countered by proposing "current wages the first year of a three-year contract, a 5 percent increase on the second anniversary of the contract." Later during this session, according to Johnson, the Union proposed a 10 percent wage increase the first year, a 5 percent wage increase on the first anniversary date of the contract, a 5 percent increase on the second anniversary date, an additional one half day holiday and dues check-off. Johnson testified that the Company "had a caucus" and

made a counter proposal, stating: "This is our final offer." The Company proposed:

> * * * zero percent increase the first year, * * * a 5 percent increase the second year, a 5 percent increase the third year an additional paid holiday the third year, and no dues deduction.

Johnson recalled that Haynes then said:

> "It seems we were so close together and so close to reaching a contract," and suggested [Brown] call his office to see if he could agree to our last proposal, and Mr. Brown went to [Johnson's] office * * * and called his office * * *.

Brown later returned to the negotiation room and proposed:

> A 10 percent increase the first year, 2 cents per card per dues check-off, 5 percent increase the second year and a 5 percent increase the third year, plus an additional holiday.

The Company, in response, proposed:

> * * * no increase the first year, a 5 percent [increase] the second year, 5 percent the third year, plus an additional holiday, and a 15 percent charge for dues deduction.

Brown assertedly "rejected that proposal" and stated: "he was sorry we could not get together and he was returning to Western Electric * * * he enjoyed meeting and working with us, but we couldn't reach an agreement."[16] Ac-

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16. Brown had testified that at the February 18 meeting, his "last proposal was to live within the guidelines of the Administration on the wage-price freeze" which would have been 5.5 percent. He explained:

(Continued on following page)

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cording to Johnson, Haynes then said to Brown: "* * * since we couldn't get together the Company was withdrawing all offers and proposals and specifically mentioned the dues check-off and Mr. Brown said yes, he understood, and he was doing the same thing on behalf of the Union."

Johnson testified that "to the best of [his] knowledge and belief, after that meeting, the Company heard from the Union more than four months later," in late June 1972. When asked by counsel for Respondent: "At the conclusion of the meeting was a statement made by Mr. Haynes that he would reduce to writing a contract as agreed upon and submit it to the Union," Johnson replied: "I did not hear that statement made." Johnson explained that the February 18 meeting "was adjourned with no future meeting scheduled or any provisions made for scheduling future meetings."

In addition, Johnson testified with respect to the Company's turnover in personnel for the years 1967 through 1972. Johnson stated: "Our turnover rate has always been extremely high in hourly classifications" which includes unit personnel. Johnson identified Respondent's Exh. 44 which shows "the number of people employed and the number of people terminated in the hourly classifications which is the bargaining unit * * *," as follows:

* * *

Footnote Continued—

> I was hanging on the 10 percent [proposal] knowing I would have to live within the guidelines of the wage-price board and we discussed this, touched on it, with Mr. Haynes * * * I just mentioned it to him * * *. I said I would be bound to the 5.5 percent. * * * [Haynes] told me there would be no increase the first year of the contract.

Johnson testified that he "did not hear such a statement" made at the February 18 session.

HOURLY EMPLOYEES
JAN. '67 TO DEC. 31, 1972
KING RADIO CORP.

	Employed	Terminated
1967	593*	371
1968	702	554
1969	580	504
1970	208	353
1971	558	453
1972	1573	1188
	4,214	3,423

*Does not include Jan. '67

It was stipulated by the parties that there were 343 eligible voters in the unit during the June 1966 election and, as noted, there were 182 votes cast for the Union and 114 against it with 3 void ballots and 26 challenged ballots. Johnson recalled that beginning in February 1968 the Company began preparing weekly reports on the number of employees in each classification. Johnson identified Respondent's Exh. 46, which purportedly indicates, *inter alia*, that "on August 9, 1972 [the Company] had 876 hourly employees" who were "employed within the bargaining unit."

Johnson noted that the strike referred to above started on March 27, 1967 and "most of the employees who were on strike and applied for reinstatement returned" "June 21, 1972." Johnson identified Respondent's Exh. 46 which lists 39 persons who had been employed by the Company prior to the strike and returned to work about June 21, June 28 and July 17, 1972. Johnson also identified Respondent's Exh. 47 as a list of 19 employees who re-

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signed during the strike. Johnson also identified Respondent's Exh. 48 as a list of 34 employees who returned to work during the strike. And, Johnson identified Respondent's Exh. 49 as a list of 24 employees who returned from the strike and are presently employed by the Company, at least as of August 11, 1972.[17] Johnson testified that on February 22, 1973, there were in fact over 1000 employees employed in the bargaining unit. Johnson testified that the Company's questioning the majority status of the Union "was based upon the turn-over of personnel * * * the increase of the work complement in the bargaining unit * * * plus the fact we had observed or seen or heard of absolutely no union activity in the plant." Johnson claimed that "annually since 1967" the Company has not "been notified as to local representation within the plant," however, the Company has "recently been notified of a change in local representation in the plant." Johnson testified that "since March 1967 [he could] recall one visit by the Local Union President and that was in 1971 * * *."[18]

The parties, according to Johnson, had bargaining sessions on October 9, October 22, November 19, November 20, December 5, December 6, December 10, December 23, December 30, 1968; January 9, May 14, December 30, 1969; January 27, February 9, February 10, February 11, February 12, 1970; August 19, August 24, August 27, September 24, December 20, 1971; and February 18, 1972. There were also bargaining sessions between certification and October 9, 1968 (See Section II, *supra.*) On cross-examination, Johnson acknowledged that the February 18, 1972

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17. Johnson explained that 2 of the 24 were first hired after the election.

18. Johnson acknowledged that during the strike employees carried picket signs at the plants.

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session "was the very first time throughout the history of bargaining that second and third year wages were agreed upon"; "that is first time the Union ever agreed to compensate the Company for dues collection"; and the items open were the "first year of wages * * * wages, holidays and dues collections * * *."

William Holiday, the Company's Vice-president, testified that he attended the December 20, 1971 and February 18, 1972 sessions. When asked: "Was there anything said by Mr. Brown at the February 18 meeting related to the 5½ percent Wage Board guide line?", he responded: "To the best of my recollection, there was not." When asked: "Was there anything said by Mr. Brown at that meeting relating to the Company reducing to writing all matters which had been agreed upon?", he replied: "I don't recall anything like that"—he "heard nothing like that said * * *." Holiday claimed that he did not hear Haynes state at the close of the February 18 session "that he would make a draft of all matters that had been agreed to and send it to the Union." On cross-examination, Holiday recalled that at "the beginning of the meeting we discussed drafts and who was going to type drafts." Holiday testified: "* * * I don't recall that anybody indicated at the conclusion of the meeting there was going to be any drafts typed up, anything further." Holiday also believed that there was a discussion on February 18 during which the Union "said 10 percent or 15 percent [increase] or whatever the law will allow."

The testimony of the witnesses summarized above is in large part mutually corroborative and substantiated by correspondence and related documents. However, insofar as the testimony stated above of Brown, Scales, Jamison and Lovett conflicts with the testimony of Johnson and Holiday, I am persuaded that the testimony of Johnson

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and Holiday more correctly and accurately reflects the transactions involved. In this respect, I note that the above testimony of Johnson and Holiday was in part mutually corroborative, substantiated in large part by General Counsel's witnesses and, further, substantiated by the various correspondence and related documents.

IV. Discussion

The legal principles applicable to this case were recently restated by the Board in *Taft Broadcasting*, WDAF—TV, AM—FM, 201 NLRB No. 113 (1973), as follows:

* * *

> The legal principles relating to withdrawal of recognition of a bargaining representative are well settled. Absent special circumstances, a union enjoys an irrebuttable presumption of majority status for one year after certification. Thereafter, the presumption continues but becomes rebuttable upon a sufficient showing to cast serious doubt on the union's continued majority status. At that point, the burden shifts to the General Counsel to prove that, on the critical date, the union in fact represented a majority of the employees. (footnotes and citations omitted.)

* * *

In *Taft Broadcasting*, as here, counsel for General Counsel and Charging Party also contended that the issue of the Union's majority status could not be raised because of the employer's unremedied unfair labor practices. The Board, in agreement with the administrative law judge, stated:

* * *

> In refusing to rely solely on a single unremedied unfair labor practice as a basis for finding the respondent's

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> conduct violative of the Act, the administrative law judge noted that the Board's order was extremely narrow in scope * * * and would not be apt to have detrimental or lasting effects upon employees in the unit. We find significant, as did the administrative law judge, that no independent violations of Section 8(a)(1) of the Act or any other violations of the Act are involved here, that 28 months had elapsed between respondent's unilateral action and the withdrawal of recognition, and that many months of good-faith bargaining took place between the parties during that period.

The Board, in disagreement with the administrative law judge, concluded in *Taft* that respondent employer had sustained its burden of showing sufficient objective facts to support its alleged good faith doubt when it withdrew recognition. Thus, as the Board noted, the administrative law judge discounted factors relied upon by respondent to rebut the presumption that the union continued to enjoy majority status such as, for example, "employee expression of dissatisfaction", "inactivity of the union at the station", "employee turnover," and an "employee poll." The Board held:

* * *

> While it is clear * * * that each of the factors relied on by the respondent standing alone may have weaknesses as a basis for supporting a good faith doubt of the union's continued majority status, we note that respondent does not rely on any one reason alone, but rather on all as a whole. The factors relied on, particularly the employee poll which showed that sentiment regarding the union was evenly divided, weakened the presumption that on the critical date the Union in fact represented a majority of the em-

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> ployees. Significantly, the respondent * * * engaged in no independent unfair labor practices and was dealing with a union which had been certified more than 20 years previously, and had never negotiated a collective bargaining contract with the respondent. The record supports the finding that the respondent had been in continuous good-faith bargaining with the union since 1966 to negotiate a contract. At no time was the union's majority affirmatively asserted by the General Counsel, and in fact from an evaluation of the entire record such majority status would appear to be in serious doubt.
>
> * * *

Accordingly, the Board held in *Taft* that respondent employer "had sufficient objective grounds for believing that a majority of the employees no longer desired union representation" and "since the General Counsel failed to come forward with evidence that * * * the union in fact did represent a majority of employees in the unit * * *," the complaint was dismissed as without merit.

Applying these principles here, I find and conclude that Respondent is not barred from questioning the Charging Party Union's majority status because of unremedied unfair labor practices. It is undisputed that Respondent fully complied with the Board's two 1967 orders after court enforcement (See Section II, *supra*). And, it is also undisputed that Respondent similarly posted the notice required by the Board's 1968 order and thereafter met with the Union for the purposes of negotiating a collective bargaining agreement on some 20 or more occasions during 1968, 1969, 1970, 1971 and 1972. The only subject remaining unresolved in the Board's third unfair labor practice order is computation of backpay and, in view of the joint motion of the parties for clarification of the

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Board's order and the Board's order of clarification which issued on October 7, 1971, I do not regard the alleged backpay obligation as unremedied unfair labor practices sufficient to bar the Employer from asserting a good faith doubt of the Union's continued majority status. Some five years have elapsed since Respondent committed unfair labor practices; Respondent has posted the required notices and complied in other respects; many months of bargaining have since taken place; and no independent violations have been alleged and proven.[19] Accordingly, I reject this contention.

The question remains, has Respondent made "a sufficient showing to cast serious doubt on the Union's continued majority status." *Taft Broadcasting, supra.* I find and conclude that Respondent, at the time it withdrew recognition during August 1972, had sufficient objective grounds for believing that a majority of the employees no longer desired union representation. Thus, the number of employees in the bargaining unit on June 30, 1966, the date of the election, was 343. In 1967, 593 hourly employees were employed and 371 were terminated. In 1972, 1573 hourly employees were employed and 1188 were terminated. The total employees employed from 1967 through 1972 was 4214 and the total terminated was 3423. Moreover, the total number of employees in the bargaining unit was 508 during October 1971, 823 during March 1972, 876 during August 1972, 937 during September 1972, and about 1054 during February 1973. In addition, 34 of the 343 employees in the unit at the time of the election returned to work during the strike; 19 of the 343 resigned during the strike; 39 of the 343 returned to work

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19. And, as discussed below, I do not find that Respondent further violated Section 8(a)(1) and (5) of the Act by refusing to furnish the Union with certain agreed upon contract items, as alleged.

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after the strike; and there were only 22 employees employed in the bargaining unit who were employed by Respondent on the date of the election.

In sum, the evidence of record establishes that from the date of the election to August 1972, when recognition was withdrawn, the size of the unit increased from 343 to 876; there was a turnover of some 4000 employees; and only 22 of the employees who were employed on the date of the election remained employed during August 1972. And, these facts must be considered in the context of an Employer who, as found herein, has engaged in no subsequent unfair practices and has been engaged in good faith bargaining with the Union for some five years to negotiate a contract.

Counsel for General Counsel, quoting from *Emerson Manufacturing Company*, 200 NLRB No. 33 (1972), argues that "the Board has consistently held * * * that employee turnover is not alone enough to provide a reasonable basis for concluding that a union has lost its majority status * * *."[20] However, as the Board held in *Taft*, factors such as an "extremely high" employee turnover may with other factors "cast serious doubt on the Union's continued bargaining role * * *." And, as the Seventh Circuit stated in *N.L.R.B.* v. *John S. Swift Company, Inc.*, 320 F. 2d 342, 345 (C.A. 7, 1962):

> * * * Of itself such turnover is no evidence of loss of majority status by the Union * * * [citations omitted.] Unlike the instant case where only a turnover of employees is shown to have existed,

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20. In *Emerson*, the administrative law judge noted that "Respondent has not shown anything unusual about the Respondent's hiring practices or the presence of any other special circumstances that would serve to negate or rebut the normal presumption" that "new employees will be presumed to support a union in the same ratio as those whom they replaced."

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> the Board, in *Stoner* [*Rubber Company, Inc.*, 123 NLRB 1440] was speaking in the context of a situation where the employer had a reasonable basis for good faith belief that the union no longer represented a majority on the critical date. * * *"

The Court, in discussing the various objective factors present in *Stoner*, noted, *inter alia*, that "it was not unreasonable to assume that the 18 early returning strikers and 18 replacements, all of whom were crossing the picket lines, were not adherents of the Union * * *." Of course, each case must rest on its own facts; however, I am persuaded that the instant case is more analogous to *Taft* and *Stoner* than to *Emerson*.[21]

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21. Counsel for Respondent also cites the Union's local inaction and the intervals between bargaining sessions over the years. I do not regard these factors as pertinent here in view of the pattern or resumption of bargaining with CWA.

During the hearing, I granted Charging Party Union's petition to revoke the subpoena duces tecum issued by Respondent directing the production of informational records showing, *inter alia*, names of employees of King Radio who were members in good standing in CWA during 1970, 1971 and 1972; the payment of Union dues by the employees during these years; the attendance of Union meetings during these years; the minutes of Union meetings; and cards and other documents signed by employees for membership in the Union. Since Respondent did not have this information on or before its withdrawal of recognition (August 11, 1972), this data does not support its claim of a good faith doubt on the critical date. Moreover, as the Court stated in *Terrell Machine Co.* v. *N.L.R.B.*, 427 F. 2d 1088, 1090 (C.A. 4, 1970):

* * *

> A showing that less than a majority of the employees in the bargaining unit were members of the union or paid union dues was not the equivalent of showing lack of union support. Manifestly, in the absence of a closed shop agreement * * * many employees are content neither to join the union nor to give it financial support but to enjoy the benefits of its representation. Nonetheless, the union may enjoy their support, and they may desire continued representation by it. *N.L.R.B.* v. *Gulfmont Hotel Co., supra.* Cf. *N.L.R.B.* v. *Darlington Veneer Co.*, 236 F. 2d 85 (4th Cir. 1956).

* * *

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Counsel for Charging Party Union argues, *inter alia*, that "Respondent had never made a claim to the Union that it doubted its majority status even though the factors upon which it relied to establish the alleged doubt in this case were well known to the Respondent during all critical times herein * * *" (br., p. 13). However, as found above, turnover of the unit employees substantially increased during 1972; the size of the unit substantially expanded between March 1972 and February 1973; and "most of the employees who were on strike and applied for reinstatement returned" during the spring or summer of 1972. Under all the circumstances, I do not regard Respondent's failure to assert earlier a doubt of the Union's majority status as controlling here.

Accordingly, I find and conclude that, at the time it withdrew recognition, Respondent had sufficient grounds for believing that a majority of unit employees no longer wanted Union representation. General Counsel has not come forward with any evidence that the Union did represent a majority of employees. Therefore, I find and conclude that Respondent did not violate Section 8(a)(1) and (5) of the Act as alleged.

Further, I find and conclude that General Counsel has failed to prove that since about February 18, 1972 Respondent failed and refused "to furnish the Union with the contract language of items agreed upon, as promised by Respondent." I do not credit the testimony of Brown and Jamison in this respect. I note that at the close of February 18 meeting, as Brown admitted, Haynes told Brown that there had to be an agreement on the total package and "asked [Brown] if he understood [Haynes] was withdrawing his package and [Brown] said yes, I understand * * *."[22] Under the circum-

22. Brown added that he "also informed [Haynes] future bargaining would be with Lovett."

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stances, I am not persuaded that Haynes or his people also promised to furnish the Union with contract language of items agreed upon.[23]

V. Conclusions of Law

1. Respondent King Radio Corporation is, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Charging Party Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not shown by a preponderance of the evidence that Respondent violated Section 8(a)(1) and (5) of the Act as alleged in the complaint, as amended.

RECOMMENDED ORDER[24]

I recommend that the complaint as amended be dismissed in its entirety.

Dated at Washington, D. C.

/s/ Frank H. Itkin
Frank H. Itkin
Administrative Law Judge

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23. I note that Respondent, in withdrawing recognition, also claims a genuine impasse. It is unnecessary for me to reach this issue. However, I would find and conclude that, in view of the substantial progress made at the December 20 and February 18 sessions (see Section III above), there was no genuine impasse as asserted by Respondent. Cf. *Industrial Union of Marine and Shipbuilding Workers etc.* v. *N.L.R.B.*, 320 F. 2d 615, 622 (C.A. 3, 1963).

24. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

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APPENDIX D

Relevant Provisions of the National Labor Relations Act

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

. . .

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

SEC. 8. (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

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(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employer, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if

such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

SEC. 10. (e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be con-

clusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1615

KING RADIO CORPORATION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. A1-A6) is reported at 510 F. 2d 1154. The decision and order of the National Labor Relations Board (Pet. A9-A68) are reported at 208 NLRB No. 82.

JURISDICTION

The judgment of the court of appeals enforcing the Board's order (Pet. A7-A8) was entered on March

5, 1975, and a petition for rehearing was denied on March 24, 1975 (App. A, *infra*, p. 1a).[1] The petition for certiorari was filed on June 20, 1975.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the employer lacked a reasonable basis for believing that the union, which had been certified as the representative of its employees, no longer had majority support and thus was not privileged to withdraw recognition.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. A69-A72.

STATEMENT

In August 1966, the Communications Workers of America, AFL-CIO ("the Union") was certified by

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[1] On May 12, 1975, the court below declined to stay its judgment (App. B, *infra*, p. 2a), and, on June 13, 1975, it adjudged petitioner in civil contempt for failing to comply with that judgment (App. C, *infra*, pp. 3a-6a).

[2] On the same date, Mr. Justice White denied a stay of the court of appeals' judgment pending final disposition of the petition.

the Board as the collective bargaining representative of a unit of employees of the King Radio Corporation ("the Company"), following a 182-114 vote in its favor (Pet. A10). Prior and subsequent thereto, the Company committed various unfair labor practices, which led to three Board orders within a thirteen-month period.[3] The orders, enforced by the court below, contained provisions requiring the Company to bargain with the Union in good faith (Pet. A10-A12, A35-A39).

The Company and the Union resumed bargaining, and met on 21 occasions. On February 18, 1972, the last negotiating session in this series, the parties were closer than ever before to a contract (Pet. A3, A27). The Company nevertheless ignored repeated Union efforts to continue the negotiations (Pet. A3, A10, A49-A50).

In August 1972, the Union filed unfair labor practice charges with the Board, alleging another refusal to bargain. In answering that charge, the Company —for the first time—questioned the Union's majority

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[3] 166 NLRB 180 (June 28, 1967) (reprisals against two supervisors for testifying in the representation hearing, in violation of Section 8(a)(1) of the Act); 166 NLRB 649 (June 30, 1967) (unilateral changes in work rules, retirement benefits, and other employment terms, in violation of Section 8(a)(5) of the Act); and 172 NLRB 1051 (July 9, 1968) (surface bargaining and unilateral abrogation of 1967 wage structure, in violation of Section 8(a)(5) of the Act). The court below enforced the Board orders in the first two cases on July 22, 1968 (398 F. 2d 14), and enforced the order in the third case, in pertinent part, on September 17, 1969 (416 F. 2d 569, certiorari denied, 397 U.S. 1007).

BLEED THROUGH

status. At the hearing which ensued, it was established that the size of the unit had grown from 343 at the time of the 1966 election to 823 at the time the Company ceased bargaining with the Union and 876 when it claimed to doubt the Union's majority status. Moreover, because of considerable turnover, only 22 employees who were present at the time of the 1966 election remained in the unit (Pet. A58-A59, A64-A65).

The Board, reversing its Administrative Law Judge, concluded that the Company's reliance on the increased size of the unit and its large turnover did not establish "objective grounds for a reasonable belief that the Union had lost its majority status" since the 1966 election, because under settled authority, the "new employees will be presumed to support a union in the same ratio as those they may replace" (Pet. A24). The Board further concluded that the Company's claim of doubt of the Union's majority status was an "afterthought in response to the charge filed by the Union * * * and merely constituted another effort * * * to avoid the possibility of entering into an agreement with the [Union]" (Pet. A27). Accordingly, the Board held that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (Pet. A28).

The Board ordered the Company to cease and desist from these unfair labor practices and from in "any like or related manner" interfering with the employees' Section 7 rights; to bargain collectively with the Union as the unit representative; and to embody

such understanding as might be reached in a written signed agreement (Pet. A30-A31). The court of appeals enforced the Board's order (Pet. A1-A6).

ARGUMENT

1. It is well established that Board certification of a union as the representative of a unit creates a rebuttable presumption of continued majority status after the first year (*Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 98). In the particular circumstances of this case, where the Company showed no more than that the bargaining unit had substantially expanded and that many employees had been replaced since the 1966 election, the Board properly concluded that the Company did not rebut the presumption of continued majority status. See *National Labor Relations Board* v. *The Little Rock Downtowner*, 414 F. 2d 1084, 1091 (C.A. 8), and cases there cited: *National Labor Relations Board* v. *Washington Manor, Inc.*, C.A. 6, Nos. 74-1881, 74-1882, July 24, 1975.[4]

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[4] There is no conflict among the circuits on the necessity for more evidence than this. In all the cases upon which petitioner relies (Pet. 19) there was additional evidence which cast doubt on whether support for the union had continued. Thus, in *National Cash Register* v. *National Labor Relations Board*, 494 F. 2d 189, 194 (C.A. 8), employee decertification petitions were filed with enough signatures to require a decertification election under the Board's procedures. In *Ingress-Plastene, Inc.* v. *National Labor Relations Board*, 430 F. 2d 542, 546 (C.A. 7), the union admitted to the employer that, in the unit of 156 employees, the 49 checkoff authorizations represented the upper limit of employee support. In

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2. Contrary to petitioner's assertion (Pet. 11-18), there is no conflict of decisions as to the appropriate standard to be applied in withdrawal-of-recognition cases. Both *Celanese Corp.*, 95 NLRB 664 and *Stoner Rubber Co.*, 123 NLRB 1440, require that the employer support its claimed doubt of the union's majority status with reasonable grounds for believing that there has been a significant decline in support for the union.[5] As the Seventh Circuit noted in

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National Labor Relations Board v. *Laystrom Mfg. Co.*, 359 F. 2d 799, 800-801 (C.A. 7), while the union, which had won a close election, was willing to prove its continued majority status after the first two yearly contracts, it refused to do so again after expiration of the latest agreement. In *Capitol Aviation* v. *National Labor Relations Board*, 355 F. 2d 875, 877 (C.A. 7), 33 of the 58 unit employees signed a decertification petition. Finally, in *National Labor Relations Board* v. *H. P. Wasson & Co.*, 422 F. 2d 558, 559-560 (C.A. 7), the employer conducted a lawful poll wherein 27 of the 51 unit employees indicated a desire not to have the union.

[5] In *Celanese*, the Board stated (95 NLRB at 672): "[A]fter the certificate is a year old, as in cases where there is no certificate, the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, *provided* that the doubt is in *good faith*." The Board added (*id.* at 673): "There must * * * have been some *reasonable grounds for believing* that the union had lost its majority status since its certification" (emphasis added).

In *Stoner Rubber*, the Board stated (123 NLRB at 1445): "After the lapse of the certification year * * * to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with *evidence* that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit."

Orion Corp. v. *National Labor Relations Board*, 89 LRRM 2135, 2137 (Pet. 13-14), under both authorities the "'good faith doubt' must satisfy an objective test, although subjective evidence may be used to bolster the argument that such doubt existed at the relevant time." As shown, the Company did not satisfy that minimum requirement in the instant case. There is thus no occasion to reach the question whether, had it done so, that would have provided an absolute defense to the refusal to bargain charge, or merely shifted the burden to the General Counsel to prove that the Union in fact possessed majority support (see n. 5, *supra*).[6]

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[6] The standards set forth in *National Labor Relations Board* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, are inapposite because they pertain to initial recognition in circumstances where a Board election is precluded. *Automated Business Systems* v. *National Labor Relations Board*, 497 F. 2d 262 (C.A. 6) (Pet. 18) is not to the contrary. There, unlike here, the employer had an objective basis for doubting the union's continued majority status. However, since the employer had committed other unfair labor practices which were sufficient to warrant the setting aside of a decertification election which the union had lost, it was appropriate to apply the *Gissel* criteria by analogy.

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
DAVID S. FISHBACK,
Attorney,
National Labor Relations Board.

JULY 1975.

APPENDIX A

MARCH TERM—MARCH 24, 1975

Before Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, and Honorable William E. Doyle, Circuit Judges

No. 74-1421

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KING RADIO CORPORATION, RESPONDENT

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, INTERVENOR

This matter comes on for consideration of the Petition for Rehearing filed March 19, 1975, by Respondent King Radio Corporation in the captioned cause.

Upon consideration whereof, the Petition for Rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy

Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By /s/ Anne Cabot
Deputy Clerk

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APPENDIX B

MARCH TERM—May 12, 1975

Before Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, and Honorable William E. Doyle, Circuit Judges

No. 74-1421

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KING RADIO CORPORATION, RESPONDENT

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, INTERVENOR

This matter comes on for consideration of Respondent's motion for recall of mandate and stay of reissuance pending application for certiorari in the captioned cause.

Upon consideration whereof, the motion is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX C

MAY TERM—JUNE 13, 1975

Before Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, and Honorable William E. Doyle, Circuit Judges

No. 74-1421

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KING RADIO CORPORATION, RESPONDENT

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, INTERVENOR

The National Labor Relations Board has moved for adjudication of respondent King Radio Corporation in civil contempt for its violation of the court's March 5, 1975, order for enforcement of the Board's award.

In August, 1966, Union was certified as the exclusive bargaining agent of an appropriate unit of respondent's employees. Three times we have ordered respondent to bargain with Union. See King Radio Corporation v. N.L.R.B., 398 F.2d 14, (July 22, 1968); N.L.R.B. v. King Radio Corporation, 416 F.2d 569, (November 17, 1969), cert. denied 397 U.S. 1007; and N.L.R.B. v. King Radio Corporation, 510 F.2d 1154, (February 12, 1975). In the last appeal we ordered the mandate to issue forthwith. Formal judgment was entered on March 5. Rehear-

ing was denied on March 24. On April 9, we denied respondent's motion for recall of mandate and stay pending application for certiorari. Eighty-one days have elapsed since we denied rehearing. The records in the office of the clerk do not disclose any notice from the Clerk of the Supreme Court that an application for certiorari has been filed and there is no record in this court of an application to the Supreme Court for stay pending certiorari.

The NLRB motion discloses that on May 19 the Union representative wrote respondent's lawyer requesting specified information and the resumption of bargaining on any or all of eight mentioned dates between May 22 and June 5.

On May 22, respondent's lawyer replied saying that "King Radio is filing an application for writ of certiorari in the United States Supreme Court"; that any recognition extended Union is "conditional"; that any agreement reached would "be conditioned upon final action by the United States Supreme Court;" that "King Radio is agreeable to resuming negotiations on June 2"; and that the requested information would then be available. On May 23 Union replied that it would not negotiate on a "conditional" basis and that "[a]t such time as the Company is willing to negotiate in good faith without conditions the Union is ready and willing."

Respondent's statement in opposition to the Board motion states that respondent's negotiating committee appeared at the point designated by Union on June 2 with the data requested by Union and that respondent

was "prepared to commence negotiations." It is further averred that no representative of Union appeared.

With its statement in opposition, respondent filed a motion for extension of time to file a memorandum, to present oral argument, and for an evidentiary hearing.

We have no patience with respondent's position. Eight years and ten months have gone by since Union was certified as representative of the employees. Respondent has consistently and persistently maneuvered to escape the impact of Board's awards and this court's decisions. We denied a stay of our last order and the records of the case show no attempt to secure a stay from the Supreme Court. We will not permit further disregard of our orders. If they may be ignored at the whim of a party, the entire enforcement procedure of the National Labor Relations Act is rendered meaningless.

The most that can be said for respondent is that it is willing to bargain on its own conditions. We have ordered bargaining in good faith. The exchange of correspondence and the persistent delays of respondent, show a wilful lack of good faith and present no justification for a further extension of time or an evidentiary hearing. On the admitted facts a summary adjudication of civil contempt is proper. See Reliance Mfg. Co. v. National Labor Relations Board, 7 Cir., 143 F.2d 761, and West Texas Utilities Co. v. National Labor Relations Board, D.C.Cir., 206 F.2d 442, cert. denied 341 U.S. 939.

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Accordingly, it is ordered:

1. Respondent's "Motion for Extension of Time to File a Memorandum in Opposition, Present Oral Argument and for an Evidentiary Hearing" is denied.

2. The court finds that Respondent has wilfully failed and refused to bargain with Union in good faith and is in civil contempt of this court's March 5, 1975, judgment entered herein.

3. Respondent may purge itself of the contempt by

(a) Forthwith complying with and obeying the March 5, 1975, judgment;

(b) Forthwith notifying Union that it is ready and willing to promptly bargain collectively, unconditionally, and in good faith and, if an understanding is reached, to embody such understanding in a written agreement.

4. To assure compliance with this order and the March 5 judgment, the court will, on application of Board, assess a substantial compliance fine for each and every day after June 26, 1975, in which Respondent fails to comply with this order and the March 5 judgment.

5. In the event of noncompliance with this order and the March 5 judgment, the court will consider, on application of Board, the issuance of appropriate process against any officer or agent of Respondent responsible for noncompliance.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

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